

REPORT  
OF THE  
SELECT COMMITTEE  
ON CONGRESSIONAL OPERATIONS  
U.S. HOUSE OF REPRESENTATIVES  
AND THE  
COMMITTEE ON  
RULES AND ADMINISTRATION  
U.S. SENATE  
IDENTIFYING  
COURT PROCEEDINGS AND ACTIONS OF VITAL  
INTEREST TO THE CONGRESS

*Cumulative to May 15, 1978*



Printed for the use of the House Select Committee on Congressional  
Operations and the Senate Committee on Rules and Administration



REPORT  
OF THE  
SELECT COMMITTEE  
ON CONGRESSIONAL OPERATIONS  
U.S. HOUSE OF REPRESENTATIVES

PURSUANT TO  
HOUSE RESOLUTION 420  
NINETY-FIFTH CONGRESS  
AND THE  
COMMITTEE ON  
RULES AND ADMINISTRATION  
U.S. SENATE

PURSUANT TO  
SENATE RULE XXV, (n) (2)  
IDENTIFYING  
COURT PROCEEDINGS AND ACTIONS OF VITAL  
INTEREST TO THE CONGRESS

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U.S. GOVERNMENT PRINTING OFFICE

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# HOUSE RESOLUTION 420 (95TH CONG., 1ST SESS.)

## SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS

\* \* \* \* \*

### FUNCTIONS OF SELECT COMMITTEE

SEC. 3. (a) The select committee shall continue the functions of the Joint Committee on Congressional Operations for the House, as follows:

\* \* \* \* \*

(2) Identifying any court proceeding or action which, in the opinion of the select committee, is of vital interest to the Congress, or to the House of Representatives as a constitutionally established institution of the Federal Government, and calling such proceeding or action to the attention of the House.

\* \* \* \* \*

## SENATE RULE XXV, (n)(2)

### COMMITTEE ON RULES AND ADMINISTRATION

\* \* \* \* \*

Such committee shall also—

\* \* \* \* \*

(B) Identify any court proceeding or action which in the opinion of the Committee, is of vital interest to the Congress as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of the Senate.



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## INTRODUCTION

In accordance with the provisions of House Resolution 420 of the 95th Congress and Senate Rule XXV, the Select Committee on Congressional Operations and the Senate Committee on Rules and Administration are continuing the practice of reporting on court cases and actions of importance to the Congress as a constitutionally established institution of the Federal Government.

This report, Part 4 for the 95th Congress, provides case briefs, accounts of the status of court proceedings and the full text of decisions in cases which the Committees have identified as being of vital interest to the Congress. Major changes in the briefs of previously reported cases appear in bold type. Those filed before the publication of the most recent preceding report but appearing in the reporting series for the first time are described as "(Newly Reported Cases)". Cases filed after the publication of the most recent preceding report are designated as "(New Cases)".

The Committees will continue the practice of publishing cumulative reports of court proceedings and actions periodically throughout the 95th Congress. We encourage comments from all Members of Congress and others who use this report as an information source and research document. We also would welcome and appreciate any information or suggestions as to pending court proceedings and actions which do not appear in this report.

JACK BROOKS, *Chairman,*  
*House Select Committee on*  
*Congressional Operations.*

CLAIBORNE PELL, *Chairman,*  
*Senate Committee on Rules*  
*and Administration.*



## COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

### I. CONSTITUTIONAL QUALIFICATIONS OF MEMBERS OF CONGRESS

#### *Clancey v. Albert*

Civil Action No. 77-3010 (Ninth Cir.)

*Brief.*—Michael Patrick Clancey, a resident of the 40th Congressional District of California, filed this complaint on March 25, 1976, in the United States District Court for the Central District of California. In it he named as defendants then-Representative Carl Albert, individually and as Speaker of the U.S. House of Representatives; Representative John J. Flynt, individually and as Chairman of the House Committee on Standards of Official Conduct; then-Representative Andrew J. Hinshaw, individually and in his official capacity as a Congressman in the U.S. House of Representatives; Edmund L. Henshaw, Jr., individually and in his official capacity as Clerk of the U.S. House of Representatives; and the U.S. House of Representatives.

The complaint alleges that the defendants have denied plaintiff and other U.S. citizens residing within the 40th Congressional District of California their constitutional right to be represented in the House of Representatives by enforcement of a rule which precluded then Congressman Andrew J. Hinshaw, who had been convicted in the California courts on two felony counts unrelated to his service in Congress, from voting or participating in Congressional matters. Rule XLIII, clause 10 of the U.S. House of Representatives states:

A Member of the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is reelected to the House after the date of such conviction.

Mr. Clancey argues that Rule XLIII, clause 10, is unconstitutional in that it contravenes Article I, Section 5 and other provisions of the U.S. Constitution and thereby results in taxation without representation.

He also contends that the House Rule which barred participation by Representative Hinshaw is defective and inappropriate, that it should be replaced by a House proposal to amend the Constitution to provide qualifications for Members of Congress in addition to those prescribed in Article I, Section 5, and therein to establish a



Code of Ethics through which a Member can be expelled and replaced for certain illegal or unethical activities.

On June 2, 1976, while this action was pending in the District Court, Mr. Clancey filed in the U.S. Supreme Court a motion for leave to file a petition for a writ of *mandamus* commanding the defendants to vacate Rule 43, clause 10 and that a writ of prohibition be issued prohibiting the defendants from enforcing this provision. On July 16, 1976, the defendants filed an opposition, stating that the Supreme Court had neither original nor appellate jurisdiction in this matter. On October 4, 1976, the Court denied Mr. Clancey's motion to file his petition.

On June 18, 1976, defendants Albert and Flynt filed in the District Court a motion to dismiss on the grounds that (1) the court lacks jurisdiction over the subject matter of the complaint, (2) the U.S. House of Representatives may not be sued in that name, (3) this action as against the defendant Congressmen is barred by virtue of the Speech or Debate clause of the Constitution, (4) the action should be dismissed because venue is improper, and (5) the court lacks personal jurisdiction over the defendant Congressmen.

On July 27, 1976, the District Court entered orders:

(1) dismissing the U.S. House of Representatives from this action on the ground that the action as against the said defendant is barred by the doctrine of sovereign immunity; and (2) dismissing Congressmen Carl Albert and John J. Flynt, Jr., from the action on the grounds that the action as against them is barred by the Speech or Debate clause of the U.S. Constitution (Article I, Section 6, clause 1).

A motion to dismiss the Clerk of the House as a defendant was filed on January 21, 1977.

On April 4, 1977, the District Court dismissed the action as moot.

On April 19, 1977, the plaintiff filed a notice of appeal. The cause was docketed in the Court of Appeals on September 1, 1977.

*Status.*—The appeal is currently pending before the U.S. Court of Appeals for the Ninth Circuit.

### ***Laxalt v. Kimmitt***

No. 78-1433 (D.C. Cir.)

*Brief.*—On July 14, 1977, Senators Paul Laxalt, Barry Goldwater, Carl Curtis, S. I. Hayakawa and Lowell Weicker filed this action in the Federal District Court for the District of Columbia and asked that a three-judge court be convened to hear the case. The Senators were joined in the suit by the Committee for the Survival of a Free Congress (hereinafter "CSFC") an unincorporated political committee which contributes to campaigns of candidates for public office.

The suit asks that Rule XLIV of the Senate Ethics Code, and if necessary, the entire Ethics Code be declared null and void as violative of several provisions of the Constitution. Named as defendants are the Chairman of the Senate's Select Committee on Ethics, Senator Adlai E. Stevenson III, and the Secretary of the Senate, J. S. Kimmitt, who as the chief administrative officer of the Senate, the plaintiffs assert, "causes the Ethics Code and all reports, resolutions, and other actions of the Select Committee on Ethics to be disseminated to Senators and elsewhere." [*Laxalt v. Kimmitt*, No. 77-1230 (D.D.C.), Complaint at 6.] Additionally, the



plaintiffs allege that Senator Stevenson and Mr. Kimmitt are "responsible for and exercise ministerial jurisdiction over the enforcement of the Ethics Code by said Committee and by the Senate." [Complaint at 7.]

Particularly the plaintiffs attack the limits on outside earned income prescribed by Rule XLIV. The Rule, which becomes effective in 1979 would, among other things, limit the amount of "outside earned income" a Senator could earn in a year to 15 percent of the aggregate amount of base salary paid to Senators and disbursed by the Secretary of the Senate.

The plaintiffs first allege that this limitation in fact constitutes a qualification for membership in the Senate in addition to and therefore in violation of Article I, Section 3, clause 3 of the Constitution which reads in full:

"No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Next the Senate plaintiffs assert that by limiting the compensation they can receive for speaking and by putting them in jeopardy of "political ruin and personal villification" if they violate Rule XLIV, the Rule deprives them of their rights to freedom of speech under the First Amendment. They also assert that their First Amendment associational rights are denied by the Rule because they are precluded from supporting without similar risk candidates for the Senate who have earned, earn, or may earn in excess of the "outside earned income" limit prescribed by the Rule.

The CSFC also asserts that the Rule deprives it of its First Amendment right to support senatorial candidates "who have earned, earn, or may earn such prescribed sums." [Complaint at 8.]

As a third count the Senate plaintiffs assert that the Rule's limitation on "outside earned income" violates the Fifth Amendment of the Constitution in that by prohibiting them from receiving such "outside earned income" it deprives them of liberty and property without due process of law.

The Senate plaintiffs, in the fourth count of their complaint, allege that Rule XLIV denies and disparages their Ninth Amendment rights to earn "outside earned income" over the limit and to support candidates for the Senate "who have earned, earn, or may earn in excess of said limitation." [Complaint at 9.] Additionally, they assert that the Rule is an unjustified intrusion of their privacy in violation of the Fifth and Ninth Amendments. The CSFC also asserts that the Rule violates its Ninth Amendment right to support candidates for the Senate who have earned, earn, or may earn in excess of the "outside earned income limitation."

As a final count, the Senate plaintiffs assert that the Rule inviscerally discriminates against them and denies them the equal protection of the laws in that the Rule limits "outside earned income," but places no limitation on inherited income, "unearned" income, the income of a spouse, or income from a trust fund. They further assert that the "outside earned income" limitation is "an improper classification" because it "bears no reasonable relation to the purported purpose of the Senate Ethics Code." [Complaint at 10.]

The CSFC also asserts that it is invidiously discriminated against and denied the equal protection of the laws in that Rule XLIV effectively precludes it from supporting Senate candidates whose "outside earned income" is in excess of the Rule's limitations.

On August 11, 1977, Common Cause, David Cohen, President of Common Cause, and Nan Waterman, Chairwoman of Common Cause, citing Common Cause's "history of involvement in the enactment of ethics rules" including the Rule complained of by the plaintiffs, filed a motion to intervene as defendants in the action.

On September 2, 1977, the motion to intervene as party defendants filed by Common Cause, David Cohen, and Nan Waterman was granted.

On December 21, 1977, the intervening defendants moved to dismiss the action.

On December 23, 1977, plaintiffs filed an amended complaint in which they deleted their prayer for convocation of a three-judge District Court pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284.

Defendants moved to dismiss the amended complaint on January 9, 1978. The motion was heard and granted on March 3, 1978.

On March 13, 1978, an order dismissing the action was filed. The court first found that the amended complaint sufficiently alleged the requisite jurisdictional amount. The order declared that Rule XLIV does not add to the constitutional qualifications for Senate membership nor does it deprive the plaintiffs of their freedom of speech. Additionally, the order stated that the Rule's differentiation between earned and unearned income does not constitute unlawful discrimination. Therefore, the court further concluded, the complaint fails to state a claim on which relief can be granted and that the amended complaint does not allege a justiciable case or controversy.

Finally the court declared that its disposition of the issues already mentioned made it unnecessary for the court to address the question of standing.

Plaintiffs filed a notice of appeal on March 24, 1978.

On April 6, 1978, defendants Kimmitt and Stevenson filed a notice of cross-appeal from those portions of the final judgment of the District Court which (1) hold that the first amended complaint sufficiently alleges the requisite jurisdictional amount and (2) conclude that the disposition of other issues raised by the motions of the defendants makes it unnecessary to dispose of the issues raised with respect to the standing of the plaintiff, Committee for the Survival of a Free Congress, and the intervenors, Common Cause, David Cohen and Nan Waterman.

*Status.*—The case is pending before the U.S. Court of Appeals for the District of Columbia Circuit.

The March 13, 1978, order of the District Court is printed in the "Decisions" section of this report at 175.

## II. CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS

### *Davis v. Passman*

No. 75-1691 (Fifth Cir.)

*Brief.*—Plaintiff, Shirley Davis, served as deputy administrative assistant on the staff of Representative Otto E. Passman from February 1, 1974 through July 31, 1974, on which date her employment was terminated. She then filed this complaint, naming then-Representative Passman as defendant, in the U.S. District Court for the Western District of Louisiana on August 7, 1974, alleging that she had been discriminatorily dismissed from defendant's Congressional staff because of her sex, in violation of her constitutional rights under the Fifth Amendment.

Plaintiff supplemented her complaint with a letter from the defendant, in which Mr. Passman indicated, in dismissing her, that he had concluded "it was essential that the understudy to my Administrative Assistant be a man."

Representative Passman filed a motion to dismiss the complaint, stating: (1) The alleged conduct of the defendant is not violative of the Fifth Amendment; (2) the law affords no private right of action to plaintiff; and (3) the doctrines of official and sovereign immunity bar any action against the defendant.

In a hearing on February 24, 1975, U.S. District Judge Tom Stagg, of the U.S. District Court for the Western District of Louisiana, dismissed plaintiff's complaint on the grounds that it failed to state a claim against Mr. Passman upon which relief could be granted. The court held that the alleged sex discrimination by Mr. Passman did not violate the Fifth Amendment to the Constitution and that the law affords no private right of action to plaintiff. The court further held, however, that Mr. Passman's defense of sovereign and official immunity was not well founded.

Mrs. Davis filed an appeal with the U.S. Court of Appeals for the Fifth Circuit on March 20, 1975.

Representative Passman filed his response with the Court of Appeals on June 9, 1976. While supporting the District Court's decision to grant his motion to dismiss, he reasserted his contention that the doctrines of "sovereign and official immunity" are a bar to Mrs. Davis' claim.

The Court of Appeals in its decision of January 3, 1977, rejected Representative Passman's assertions of sovereign, official and Speech or Debate clause immunity. After determining that the allegations asserted by Mrs. Davis would, if proven, constitute a violation of her constitutional rights, the majority took up the question of whether the claim was one upon which relief could be granted. The court noted that Mrs. Davis was seeking three types of relief: specific relief, damages, and a declaratory judgment.

Turning first to the question of specific relief the court noted that there were three remedies requested: Reinstatement, promotion, and an injunction against unlawful discrimination. Of those



three remedies only the claim for an injunction "might raise a sovereign immunity issue \* \* \*." [*Davis v. Passman*, 544 F.2d at 865, 871 (5th Cir. 1977).] The court further noted that Representative Passman's defeat in his bid for reelection has caused Mrs. Davis' requests for reinstatement and a promotion to lose their significance. "That the term is not yet completely over saves the specific-relief claims from technical mootness \* \* \*." [544 F.2d at 872.]

As for Mrs. Davis' claim for damages the court found that damages would be an appropriate remedy for the allegation of constitutional violation and that Representative Passman's assertions of immunity were not well taken. As to whether sovereign immunity would bar recovery, the court concluded that the damages sought were against Representative Passman individually, not against the United States. The court declared: "When, as here, an action seeks to impose liability upon a Government official in an individual capacity, sovereign immunity poses no bar. Although sovereign immunity sometimes shields the U.S. Treasury from a plaintiff's claims, it does not protect the personal checkbook of an individual Government official to any extent at all." [544 F.2d at 877.]

Turning next to the question of whether Speech or Debate clause immunity was an absolute shield against the action, the court stated that such immunity was available only for actions taken in the legislative process. The court concluded that "representatives are not immune from inquiry into their decisions to dismiss staff members. Such dismissal decisions certainly are not 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House' \* \* \*." [544 F.2d at 880.]

The court then rejected Representative Passman's argument that he was protected by the doctrine of official immunity. The court further noted that its rejection of Speech or Debate clause immunity precluded Representative Passman from asserting an absolute immunity. As for a qualified immunity, the court noted that such immunity was generally limited to good faith, nonmalicious action. The court concluded that "[i]n light of the settled, indisputable principle that federal government sex discriminations not supported by rational (or perhaps compelling) legitimate justifications are unconstitutional \* \* \*, the likelihood that Representative Passman will be able successfully to maintain a good faith defense even under the liberal standard governing congressional staffing decisions appears very remote." [554 F.2d at 881-882.]

As for the declaratory relief requested by Mrs. Davis, the court declined to rule on the propriety of such relief, noting that "the absence of any forward-looking scope of operation for any declaration of Davis' rights as against Representative Passman, whose congressional tenure is virtually at its end, would make the propriety of such a declaration questionable." [544 F.2d at 882.]

The dissent concluded that the doctrine of separation of powers required that the dismissal of the action by the District Court be affirmed.

The case was remanded to the District Court for further action. On February 16, 1977, Mr. Passman filed a motion for rehearing *en banc*.

On March 15, 1977, the Department of Justice filed a brief *amicus curiae* with the Court of Appeals supporting the motion for rehearing and asking leave to participate in oral argument if the motion for rehearing were granted.

On March 31, 1977, a motion for leave to file an *amicus* brief in opposition to the motion for rehearing was filed by individuals who are members of the House Fair Employment Practices Committee. According to the motion:

The House Fair Employment Practices Committee was formed pursuant to the House Fair Employment Practices Agreement. This committee is a voluntary organization; it is not a Standing or Select Committee formed by resolution of the House of Representatives. It consists of six elected members. Three of these members are the U.S. Representatives filing this motion who were elected by the Representatives signing the agreement. The other three members are the congressional employees who are joining in the filing of the motion and who were elected by the employees of those Representatives signing the agreement. [Motion by the Honorable Morris Udall, *et al.*, for Leave to File a Brief Amicus Curiae at 2, Davis v. Passman, No. 75-1691 (5th Cir.).]

The three Members of the House of Representatives on the committee, Representatives Morris Udall, Patricia Schroeder, and Charles Rose, and the three Congressional employees on the committee assert that the case was "competently and fully argued and decided," [Id. at 3], and that the petition for rehearing should be denied.

On April 18, 1977, Representative Don Edwards filed a letter with the court in which he said that the Justice Department had intervened in the matter without Congressional request or approval and that in his view the court's decision was sound and reconsideration or rehearing was not necessary. He also asserted that the Justice Department's brief does not accurately describe the alleged burdens this decision would place upon Members of Congress. He asked that he be allowed to file an *amicus* brief if a rehearing were granted.

On May 17, 1977, the court granted the petition for a rehearing *en banc*.

On August 19, 1977, a letter was filed advising the court that the United States would appear at the oral argument as *amicus curiae*.

On September 26, 1977, the case was reheard *en banc*.

On April 18, 1978, the U.S. Court of Appeals for the Fifth Circuit rendered its decision *en banc* in an opinion reversing the earlier panel opinion. In so doing, the earlier judgment of the U.S. District Court dismissing Mrs. Davis' claim was affirmed on the ground that the law affords her no private right of action in the Federal courts for money damages. The *en banc* opinion vacated the decision of the District Court in regard to that court's holding

that the conduct of which Mrs. Davis complained did not violate the Constitution.

To determine whether a cause of action for money damages would lie for a violation of Fifth Amendment due process rights the court first noted that the Supreme Court had found that such a remedy was available to parties asserting a violation of their Fourth Amendment rights [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed. 2d 619 (1971)]. Concluding that the award of money damages in *Bivens* was implied as a matter of Federal common law, and as such subject to the power of Congress to alter or withdraw, the court set forth a two-step analysis to determine whether the money damages sought by Mrs. Davis could be implied in the Federal common law for a violation of Fifth Amendment due process rights:

First, we look to the jurisprudence of statutory implication to determine whether to imply a damage action of non-constitutional dimensions. Second, if this initial inquiry does not suggest that such an action should be implied, we must determine whether the Constitution nevertheless compels the existence of a remedy in damages to vindicate the rights asserted. [Slip Opinion at 3511; this report at 181.]

The majority noted four factors which have been utilized in the past to determine whether to imply a cause of action from a right created by statute: (1) whether the provision asserted creates an especial right in the plaintiff, (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy, (3) whether implication of the remedy would be consistent with the purpose of the right asserted, and (4) whether the cause of action implied would be one appropriate for Federal law. The court concluded that each of these factors militated against Mrs. Davis' claim.

As to the question of an especial right, the opinion stated:

While the fifth amendment Due Process Clause surely exists for the "especial benefit" of Davis, as *Cort* [*Cort v. Ash*, 422 U.S. 66 (1975)] required, it does not exist with equal certainty to protect her tenure in a non-competitive personal aide position statutorily denominated as service at will. 2 U.S.C.A. § 92. [Slip Opinion at 3511; this report at 181.]

The court found that the action of the Congress in excluding Congressional employees from the protection of Title VII of the 1964 Civil Rights Act and the 1972 amendments thereto coupled with 2 U.S.C.A. § 92 (which provides that Members of a Congressman's personal staff are removable by him "at any time \* \* \* with or without cause") was instructive as to Congressional intent.

The court further noted that:

Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in non-competitive positions, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive

services, whom it did intend to protect. [Slip Opinion at 3512; this report at 182.]

As to the question of consistency of the implication of the remedy of damages with the statutory purpose, the court noted that substantial difficulties existed in providing money damages for violation of Fifth Amendment due process rights which were not present when the court implied such a remedy for violation of Fourth Amendment rights. On this point the court stated:

Violations of fourth amendment rights occur in a well-defined setting familiar to the courts. The relationship is always one between law enforcement officials and citizens suspected of possessing evidence of crime. The context in which these violations may arise is sufficiently limited to allow the court to determine that an action for damages would be consistent with the purpose of the fourth amendment in future instances in which such an action might be invoked. The fifth amendment Due Process Clause presents no similarly focused remedial issue. To the contrary, the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable and that there is simply no way a court can judge whether this remedy will be appropriate for securing the right in future situations where some plaintiff might assert it. [Slip Opinion at 3513; this report at 183.]

Summarizing the holding of the court on whether to imply a cause of action for money damages, the opinion stated:

Not only does this case fail to present special remedial difficulties analogous to those faced by the Court in dealing with the fourth amendment, but also Congress avoided creating an action for money damages for Congressional aides in non-competitive positions. Moreover, implying this damage action necessarily would draw into the Federal judicial system a wide range of cases whose resolution Congress has not committed to the Federal judiciary and whose resolution is better suited to courts of general jurisdiction. These special considerations \* \* \* eliminate any question of our creating a remedial right under our federal common law power. [Slip Opinion at 3514; this report at 184.]

Turning to the question of whether the remedy of damages might yet be constitutionally compelled as indispensable to the effectuation of the Fifth Amendment Due Process Clause and thus not subject to Congressional preclusion, the court noted:

Denying an implied cause of action for money damages does not render meaningless any constitutional rights of Congressional employees. A plaintiff might still seek equitable relief where the employer remained in office, although Congressional employees in the non-competitive service whose allegedly discriminating employers are not in office may be left without a remedy for sex discrimination in employment unless Congress reverses its present



statutory stand. Other due process wrongs would either continue to be remedied in traditional ways through tort actions in courts of appropriate general jurisdiction or through special statutory remedies provided by state legislatures or Congress. Admittedly, some not now covered would remain inactionable. [Slip Opinion at 3514-15; this report at 184-185 (footnote omitted).]

The opinion also noted that Article III, Section 1 of the Constitution, pursuant to which Federal District and Circuit Courts of Appeals are established, could be rendered meaningless by the increased number of cases which might be brought in those courts, "crushing an already precariously overloaded Federal judicial system" were an implied cause of action for damages for violation of Fifth Amendment due process rights held to be available.

In Circuit Judge Jones' special concurring opinion he declared:

I do not believe that the constitutional provisions here pertinent are to be confined to the Speech and Debate clause.<sup>1</sup> The broader provisions by which all legislative powers are vested in the Congress<sup>2</sup> is relevant to the cause.

<sup>1</sup> The Senators and Representatives for any speech or debate in either House shall not be questioned in any other place. U.S. Const. Art. I, § 6(1).

<sup>2</sup> U.S. Const. Art. I, § 1.

\* \* \* \* \*

[T]he court should say that the hiring and firing of his "alter ego" is a legislative activity and a part of the exercise of the legislative power. The question is not one of whether there is a judicial remedy. The question, as I see it, is whether the controversy is one involving the exercise of the legislative power and within the jurisdiction of the Congress. Let it decide whether there should be absolute immunity. Let it determine whether there is a right and if so to fashion a remedy and designate a tribunal to declare and enforce it. I think it should have been held that the complaint does not state a claim upon which relief can be granted. [Slip Opinion at 3515-3516; this report at 185-186.]

In dissent, Judge Goldberg, joined by Chief Judge Brown, rejected the majority's conclusion that no private cause of action for money damages could be implied from the Due Process Clause of the Fifth Amendment. As to the question of whether the Speech or Debate clause served as a bar to the action, the dissent adopted the original decision of the Appeals Court panel which had concluded that it was not.

As to the majority's comment that equitable relief might be available to Congressional employees discriminatorily dismissed from their jobs, Judge Goldberg declared:

The majority's unelaborated suggestion of "equitable relief" is oblivious to those constitutional values, critically implicated in this case, underlying the speech or debate



clause and the doctrine of separation of powers. Congress has spoken specifically to its views on the nature of the working relationship between Congressmen and their personal staffs by classifying employees like Mrs. Davis as removable "at any time \* \* \* with or without cause." The Supreme Court has accorded congressional staffers speech or debate clause protections in certain circumstances, recognizing that staffers may act as congressional alter egos in the performance of certain legislative tasks. *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). See *Davis v. Passman*, 544 F.2d at 877-81 (panel opinion). Apparently the majority feels these values can be better effectuated, consistent with the requirements of the fifth amendment, not by actions for damages but by injunctive orders requiring Congressmen to employ particular individuals. This is not the occasion for a definitive statement on the circumstances which might justify implication of a private action for equitable relief to vindicate fifth amendment rights. But on the facts of the case before us, I would have thought that such "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396, 91 S.Ct. at 2005, are more germane to the implication of equitable relief than to implication of an action for damages.

Similarly, it would seem to me that the special problems of congressional immunity under the speech or debate clause and the doctrine of separation of powers render this case uniquely appropriate for adjudication in the federal courts under a federal cause of action. Much of the *Bivens* opinion concerns the difficulties and inadequacies of state court or state law adjudications of federal immunities in the context of constitutional claims; that reasoning is, if anything, even more powerful with respect to the issues presented here. [Slip Opinion at 3528; this report at 198 (footnote omitted).]

*Status*.—No further action has been taken.

The full text of the *en banc* opinion of the Court of Appeals panel is printed in the "Decisions" section of this report at 177.

The complete text of the opinion of the Court of Appeals panel is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

### **McAdams (formerly McClellan) v. McSurely**

No. 76-1621 (U.S. Supreme Court)

*Brief*.—On August 11, 1967, pursuant to warrants issued under a State sedition statute, Kentucky officials arrested Alan and Margaret McSurely and seized books and papers from their home. The McSurelys filed a complaint in the District Court for the Eastern District of Kentucky, challenging the constitutionality of the State statute.

On September 11, 1967, the three-judge court which heard the case issued an order directing that:

(1) the material seized in the raid on the McSurely home be left in the custody of the Kentucky Commonwealth Attorney, Thomas B. Ratliff;

(2) the material be made available to the U.S. Marshal for the Eastern District of Kentucky;

(3) Ratliff and the U.S. Marshal make an inventory of the seized material and file it with the record of the case; and

(4) Ratliff return to the McSurelys such materials as he determined were not relevant to the investigation and prosecution of the McSurelys.

That same day the McSurelys were indicted by a Kentucky grand jury.

On September 14, 1967, the three-judge Federal District Court rendered its decision holding the Kentucky statute unconstitutional and enjoining prosecution of the McSurelys. The court directed that Ratliff retain the seized materials "in safekeeping until final disposition of this case by appeal or otherwise."

On September 25, 1967, Lavern Duffy, Assistant Counsel on the staff of the Permanent Investigations Subcommittee of the Senate Government Operations Committee, called Ratliff by phone to ask about the seized documents. Subsequently, on October 8, 1967, Committee Investigator John Brick went to Kentucky, talked with Ratliff and confirmed that the seized material in Ratliff's possession contained information relating to the activities of a number of organizations in which the subcommittee was interested.

Ratliff has claimed that at some point before Brick was first given access to the seized material, he tried unsuccessfully to contact all of the members of the three-judge court to obtain their concurrence in his decision to allow Brick to inspect the documents. While he was unsuccessful in reaching two of the judges, he has stated that he did talk to the third (Judge Moynahan). Ratliff's testimony at trial on his discussion with the judge implied (according to the opinion of the minority of the *en banc* Court of Appeals) that Judge Moynahan agreed to Brick's examining and copying the material. [*McSurely v. McClellan*, 553 F.2d 1277, 1307-1308 (D.C. Cir. 1976).]

On October 12, 1967, Brick examined the material for about 4 hours. He took notes, made copies of 234 of the documents, and then returned to Washington.

Four days later, on October 16th, Senator McClellan directed Brick to prepare subpoenas *duces tecum* for the seized material in Ratliff's custody, which the Senator had determined was relevant to the subcommittee's investigations of an April 1967 riot in Nashville, Tennessee. The next day, Brick, who had returned to Kentucky, notified Judge Moynahan of the issuance of the Congressional subpoenas before serving Ratliff, the U.S. Marshal (cocustodian with Ratliff of the seized materials), and the McSurelys. The next day the McSurelys filed motions with the three-judge court seeking orders blocking Ratliff from releasing the seized material to the subcommittee and directing him to return the materials to them (the McSurelys).

On October 30, 1967, the three-judge court issued an order in response to the McSurelys' motions. The court overruled motions

that the materials in Ratliff's custody be returned to the McSurelys and that a restraining order be issued enjoining release of the materials requested "by a Committee of the United States Senate." Officers of the court and the parties to the action were directed "to cooperate with the Senate committee in making available such of the materials, or copies thereof, as the committee considers pertinent to its inquiry \* \* \* ." [553 F.2d at 1308.]

On November 1, 1967, a motion for reconsideration and rehearing of the October 30th order was denied. The court granted a 24-hour stay to allow the McSurelys to apply to the Supreme Court for review, and directed that pending such review the material not be removed from Ratliff's custody and that "copies thereof shall not be made on or before 2:00 p.m., Eastern Standard Time, November 2, 1967." [553 F.2d at 1308.]

On November 10, 1967, Mr. Justice Stewart, for the Supreme Court, ordered that the documents remain in their then custody until the three-judge court could hear and rule on the McSurelys' objections to the Congressional subpoenas.

In an order issued on December 5, 1967, the three-judge court overruled the McSurelys' objections to the subpoenas. The court ordered Ratliff to comply with the Congressional subpoenas by allowing committee representatives to make copies of the materials in his possession pursuant to the court's order. A 5-day stay was ordered in the compliance required by the order to allow the McSurelys to seek Supreme Court review.

On January 20, 1968, Mr. Justice Stewart, again speaking for the Supreme Court, stayed the three-judge court order "to the extent that the seized documents shall remain in custody." [390 U.S. 914 (1968).] The stay was conditioned on the McSurelys filing an appeal of the October 30th three-judge court order with the Supreme Court.

On March 18, 1968, the Supreme Court declined to hear the case, dismissing the appeal in a *per curiam* order [390 U.S. 914 (1968)], but continued the stay to allow the McSurelys to apply to the Sixth Circuit Court of Appeals for a stay. By the time the McSurelys' appeal to the Sixth Circuit was taken, the time for the State to appeal the three-judge court's order of September 14, 1967, finding the Kentucky statute unconstitutional, had expired.

In July of 1968, the Sixth Circuit decided that since time for appeal of the September 14th order had run, "the right of the court to retain possession of the seized documents, which include no contraband, has expired." [*McSurely v. Ratliff*, 398 F.2d 817, 819 (6th Cir. 1968).] The Appeals Court ordered that the materials be returned to the McSurelys without prejudice to the subcommittee's right to proceed with the enforcement of its subpoenas: "[Q]uestions [as to the subpoenas] may be adjudicated under the appropriate procedure for challenging subpoenas of Congressional Committees." [398 F.2d 818, cited in 553 F.2d at 1309.]

On November 8, 1968, the seized materials were returned to the McSurelys. The McSurelys, who were immediately served with new subcommittee subpoenas similar to the original subcommittee subpoenas, refused to comply with the new subpoenas.

The McSurelys filed a civil action in the U.S. District Court for the District of Columbia on the date named in the subpoenas for



their appearance before the subcommittee. They sought a declaration that compliance with the subpoenas was not required, a preliminary and permanent injunction against institution of criminal proceedings against them for their failure to comply with the subpoenas, and monetary damages.

No action had been taken in this civil suit at the time the McSurelys were indicted for contempt of Congress for failure to comply with the subpoenas. Subsequently, in their civil action, they filed an amended and supplemental complaint seeking only compensatory and punitive damages. The McSurelys alleged that the defendants, Senator McClellan, three members of the subcommittee staff, and Ratliff the Kentucky Commonwealth Attorney who initially seized from their home the documents which included those later subpoenaed by the subcommittee, entered into a conspiracy to deprive them of their constitutional rights. They sought damages "for the unlawful seizure, inspection and appropriation of their personal and business papers and documents and other objects and articles, for the issuance of subpoenas based on illegally obtained information and invalid on their face, for their humiliation and embarrassment, mental and emotional pain, loss of employment, disruption of personal privacy and safety caused thereby, all in violation and derogation of their rights under the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution and the laws of the United States." [Plaintiff's Amended and Supplemental Complaint, at 13-14.]

In the criminal action for contempt of Congress, the McSurelys were convicted and sentenced in June 1970. The convictions were appealed to the Court of Appeals. The decision of the Court of Appeals, reversing the contempt of Congress convictions of the McSurelys, was filed on December 20, 1972. The majority of the court took the position that the exclusionary rule of evidence applied to proceedings before Congressional committees as well as to criminal prosecutions, and therefore, the court held that the subcommittee's subpoenas were inadmissible as the fruit of an unlawful search and seizure. [*United States v. McSurely*, 473 F.2d 1178 (D.C. Cir. 1972).] The case was remanded to the U.S. District Court for the District of Columbia with instructions to enter judgments of acquittal in the matter of the contempt convictions. The Solicitor General decided not to petition the Supreme Court for a writ of *certiorari*.

In the civil proceedings brought by the McSurelys, Chairman McClellan and three subcommittee staff members filed a motion to dismiss, or, in the alternative, for summary judgment in the District Court on October 26, 1971.

The grounds claimed in support of the motion were:

- (1) Defendants are immune from actions for damages where as here it is clear that their conduct was within the sphere of legislative activity.
- (2) The claimant fails to state a claim upon which relief can be granted against defendants who were a U.S. Senator or employees of the Senate of the United States at all times material to this cause.
- (3) Plaintiffs are barred by collateral estoppel from relitigating issues previously settled by the judgment of this court in *United States v. Alan McSurely and Margaret McSurely*,

Criminal Nos. 1376-69, 1377-69. \* \* \* [Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, at 1.]

The motion to dismiss was denied on June 12, 1973, and after the motion for reconsideration was rejected, the Federal defendants filed notice of appeal.

In a 2 to 1 decision on October 28, 1975, the U.S. Court of Appeals for the District of Columbia reversed the District Court's ruling and remanded the case for further action consistent with its holding.

The three-judge panel of the Appeals Court held that, as a matter of law, the defendants were entitled to summary judgment on all counts of the complaint relating to the inspection by the committee investigator of the seized material, the transportation of such material to Washington by the investigator, the utilization of the information by the investigator as the basis for Congressional subpoenas, and the issuance of Contempt of Congress citations against the plaintiffs.

The Appeals Court left for the District Court on remand the determination of whether the defendants actively collaborated in the original raid on the McSurelys' home and, if so, whether there was sufficient evidence of such collaboration to merit a trial on that issue.

In addition, the Appeals Court remanded to the lower court the question of whether the defendants distributed copies of documents to individuals or agencies outside Congress—and, if so, whether such distribution was actionable. [*McSurely v. McClellan*, 521 F.2d 1024 (D.C. Cir. 1975).]

The McSurelys filed a petition for a rehearing by the Court of Appeals sitting *en banc*.

On December 10, 1975, the decision of the Court of Appeals was vacated and the petition for a rehearing *en banc* was granted.

On December 21, 1976, the Court of Appeals *en banc* issued its opinion.

A majority of the court held that as a matter of law the Federal defendants were entitled to summary judgment on:

(1) "allegations in the amended complaints pertaining to the subcommittee staff's inspection of the 234 documents that Brick [the subcommittee investigator] brought to the subcommittee,"

(2) "the utilization of the information obtained by Brick as the basis for congressional subpoenas, and"

(3) "the issuance of Contempt of Congress citations  
\* \* \* "

The majority further said that: "since no allegation has been made as to conspiracy in the original raid of the McSurelys' home, appellants are entitled to dismissal on this point." [553 F.2d at 1299.]

As to the first three points the court found that the activities complained of were done within the legislative process and were protected by Speech or Debate clause immunity or legislative immunity.

Left for the District Court's consideration and initial determination on remand were:

(1) whether any cause of action against defendants Brick and Alderman survives their deaths; (2) whether Brick's inspection of the seized material put in Ratliff's possession under the three-judge court's "safekeeping" directive, and Brick's transport to Washington of copies of 234 documents, violated the McSurelys' rights under the Fourth Amendment; (3) whether Brick selected and transported to Washington copies of documents he knew to be wholly unrelated to the legislative inquiry, and, if so, whether such conduct was actionable under the applicable law; (4) whether any other federal defendants acted in concert with Brick in action for which he enjoys no legislative immunity; (5) whether any of the federal defendants distributed copies of documents in the subcommittee's possession to individuals or agencies outside of Congress, and, if so, whether such distribution was actionable under the applicable law; and (6) other matters identified in this opinion as requiring further development. [553 F.2d at 1299.]

As to the refusal to grant summary judgment on two allegations relating to dissemination of some or all of the documents outside of the subcommittee and the Congress, the Court of Appeals found that such activity "is not legislative activity entitled to absolute immunity by force of the Speech or Debate clause, in the absence of a claim of legislative purpose." [553 F.2d at 1286.]

As to the inspection and transportation by Subcommittee Investigator Brick of documents held in "safekeeping" by court order, the refusal of the District Court to grant summary judgment was affirmed by an equally divided court. Five judges felt that on that point, "there is evidence in the record as it presently stands, 'which affords more than merely colorable substance' to the claim of an independent Fourth Amendment violation by Brick." [553 F.2d at 1289.] They hypothesized that the District Court's "safekeeping" order in effect at the time of Brick's inspection and transportation of the documents to Washington for the subcommittee's use precluded Brick from having access to the documents.

Judge Wilkey, writing for himself and four other judges, disagreed. These judges refused to accept that Brick's inspection and transportation of the documents constituted an unlawful search and seizure under the Fourth Amendment. They said that:

After a tangential approach to this basic underlying issue, the majority opinion does refer to Brick's "search-and-taking" (p. 30), the "search and seizure of Brick" (p. 32), and then asserts flatly "two separate, independent search and seizures took place here" (p. 33).

With this holding our colleagues make new law. The transfer from one investigating agency to another is not a "separate, independent search and seizure," and, as we show later, the rationale of all the Supreme Court "silver platter" decisions and the recent *en banc* specific holding

of the Ninth Circuit in *United States v. Sherwin* [531 F.2d 1 (9th Cir. 1976)] are directly contrary.

New law it is, but law absolutely necessary to the majority's holding that the McSurelys' Fourth Amendment rights were violated here, for without an "unreasonable search and seizure" by the Senate aide his investigative activities and related acts by his superiors are admittedly protected by the Speech or Debate clause. [553 F.2d at 1305.]

These five dissenting judges felt that the majority's reading of the "safekeeping order" was inaccurate. The minority concluded that the initial District Court order did not prohibit Brick's inspection and that subsequent orders by the District Court and eventually the Sixth Circuit Court of Appeals at least impliedly allowed Brick access to the documents.

During the course of the McSurelys' contempt trial, Brick "conceded that when 'he went to Pikeville to examine the documents in the Court House,' he looked through the papers and books and determined there were 'many' items that 'he didn't need at all \* \* \*.'" [553 F.2d at 1294-1295.] The majority noted: "The fact that Brick took and transported concededly extraneous material—and it is significant that he seized 'some personal letters'—takes this case outside the protection of legislative immunity." [553 F.2d at 1295.] On this point the majority concluded: "Brick's testimony at the contempt trial ultimately may be explained away to the satisfaction of a jury. But it is plainly sufficient to preclude an automatic dismissal of the lawsuit at the threshold, on the basis of legislative immunity." [553 F.2d at 1296.]

To this majority conclusion the minority responded:

The majority holds that even if Brick did not violate the Fourth Amendment in his "search and seizure" he may have violated the right of privacy of the McSurelys by taking private letters he believed to be irrelevant.

The most simple and complete answer to the majority's position, which does not necessitate evaluating the facts as to relevance or irrelevancy, is to point out the clear law in the Supreme Court that, absent an illegal search and seizure by Brick, the charge of invasion of privacy does not state a cause of action under the Constitution. Since the McSurelys' amended complaint does not allege any invasion of privacy on a statutory or common law basis, this cause of action should be dismissed if there has been no Fourth Amendment offense.

If undertaken without relevance to his official inquiry, Brick's inspection and copying of the private papers of Mrs. McSurely may amount to a cause of action at common law for "intrusion" upon her privacy. McSurelys' amended complaint, however, does not allege any such common law or statutory violation, but alleges rather a violation of the Fifth Amendment, which, of course, protects each person from deprivation by a federal official of life, liberty or property, without due process of law. Presumably, the McSurelys are alleging that Brick impaired



the privacy interest that is implicit in the "liberty" protected by due process.

Does the Fifth Amendment provide liability under [*Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] against federal officers for what amount to common law torts? The Supreme Court appears to have answered that question in the negative in the recent case of *Paul v. Davis* [424 U.S. 693 (1976)]. [553 F.2d at 1326.]

Turning to the question of whether the documents selected and transported by Brick, "were needed by him for the performance of his duties," the minority attacked the majority's conclusion that the documents were irrelevant. While the minority agreed that Brick had conceded that some of the documents might have been irrelevant to the committee's inquiry, it stated: "This [the majority] decision still amounts to 'second guessing' the legislative process since it overrides an independent estimate of relevance that could be 'plausibly interposed,' and it appears to override a judgment of relevance inferable from the subpoenas [which were subsequently issued by the Committee]." [553 F.2d at 1328.] The minority further noted that the documents which were purported to be irrelevant may in fact have been relevant to the committee's investigation. The Senate investigator was required to take such documents to the committee for its determination of relevance since "[t]he Senators or others on the staff may easily have seen something of significance in any one of these letters, definitely relevant to the inquiry of the committee, which might have escaped the knowledge or attention of Brick." [553 F.2d at 1328.]

The minority continued:

Without deigning to give any reasons therefore, the majority blandly treats the Senate investigator Brick's testimony that he did not "need that letter signed [sic] Dearest Cucumber" as a final irrevocable concession binding on the Senate Committee and this court that this particular letter (and all other letters similarly characterized by the McCurelys) were totally irrelevant to the Senate inquiry. This is a rather astonishing assumption.

In the first place, Brick's testimony was only an expression of his own need for the letter, not that of the Committee's. Brick had read the letter and presumably remembered any important features of its contents. Neither Chairman McClellan nor Brick's staff superiors had seen the letter and had had the opportunity to evaluate its contents.

Secondly, we are at a total loss to understand by what principle of law it can be held that a subordinate Senate Committee staff member can bind the Senate Committee, or indeed this court, on the question of relevance. Surely the determination of the relevance of any of the documents which Brick had inspected was for the Senate Committee, or under its usual operating procedures, for the Committee Chairman. The agreed facts are that "on October 16, 1967, at the personal direction of Senator John L. McClellan, he prepared the subpoenas involved herein."



Brick took the subpoenas to McClellan, "with whom he had conferred on the subject matter thereof since October 6, 1967," and McClellan signed the four subpoenas, two of which were directed to the McSurelys. This action of the Senate Committee Chairman, after a review of the copies of the documents brought back by Brick, evidenced the Committee Chairman's determination of what he thought was relevant for the Senate's inquiry, *i.e.*, the 234 documents. What Brick said he himself "needed for the performance of [his] duties" is of little importance in determining what the Senate Subcommittee might reasonably find relevant for its inquiries.

We would hold that, relevant or irrelevant, the Senate investigator's actions in regard to the allegedly personal letters of the McSurelys are in no way a ground for a claim of constitutional significance, as the Supreme Court held in *Paul v. Davis, supra*, and since the McSurelys have alleged no other type claim on this basis, their action on this point should be dismissed. [553 F.2d at 1330-1331 (footnotes omitted).]

In its conclusion, the minority objected strenuously to the majority's decision to remand the case to the District Court for further consideration of some of the actions taken by the Congressional defendants. The court noted:

The purpose of an absolute immunity is to cut off claims against protected parties at the outset. To be true to this purpose, a court should make every effort to determine if a claim is inside or outside the protection of the Speech or Debate clause. A remand for further factual proceedings on the issue of absolute immunity itself should be required only in the case of clear need. Otherwise the "mini-trial" that the defendant is forced to undergo constitutes an erosion of the principle of absolute immunity. The majority is engaging in such an erosion of the Speech or Debate clause here.

The uncontroverted facts, of this case, the logic of the Fourth Amendment, and the available case law support our conclusion here that the inspections and copying by Brick did not amount to an unreasonable search and seizure. Not only does the majority err in its contrary conclusions, but it abrogates its duty in deciding absolute immunity by calling for a remand. [553 F.2d at 1332-1333.]

In a separate dissent, Judge Danaher, writing for himself and three other judges, concurred in Judge Wilkey's opinion, but also expressed a general dissent from those portions of the majority's opinion which did not provide for complete dismissal of the complaint. He stated that:

A Subcommittee of the U.S. Senate was engaged in the truthfinding process which it had been commanded to execute. So it is that the Chairman of that Subcommittee and the members of its staff, under the circumstances here, should be entitled to absolute immunity.

It is respectfully submitted that this case should be remanded to the District Court with directions to dismiss the complaint. [553 F.2d at 1339.]

On May 19, 1977, the defendants filed a petition for a writ of *certiorari* with the U.S. Supreme Court.

On October 11, 1977, the petition for a writ of *certiorari* was granted.

Herbert H. McAdams, executor of the estate of the deceased Senator McClellan, was substituted for him as party petitioner on January 23, 1978.

The petition was argued before the Supreme Court on March 1, 1978.

*Status.*—The case is pending before the U.S. Supreme Court.

The full text of the decision of the Court of Appeals in the criminal action for contempt of Congress was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1972.

The full text of the decision of October 28, 1975, of the Court of Appeals was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 31, 1975.

The full text of the decision of December 21, 1976, of the Court of Appeals *en banc* was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

### ***Hutchinson v. Proxmire***

Nos. 77-1677 and 77-1755 (Seventh Cir.)

*Brief.*—On April 18, 1975, Senator William Proxmire, Chairman of the Subcommittee on Housing and Urban Development and Independent Agencies of the Senate Appropriations Committee, which has jurisdiction over funds for the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research, made a statement on the floor of the Senate relating to certain research contracts awarded by those agencies to Dr. Ronald R. Hutchinson, a Michigan research scientist. A press release which consisted almost entirely of quotations from the Senator's floor statement was authorized by Senator Proxmire's office and issued by the Senate Service Department, and at about the same time, Morton Schwartz, an aide to Senator Proxmire, alleged telephoned various Federal agencies in an attempt to persuade those agencies to terminate grants or contracts for research being performed by Dr. Hutchinson. Seven months later, Senator Proxmire appeared on a nationally syndicated television show. During that appearance Senator Proxmire made statements regarding the expenditure of Federal funds for study of certain aspects of the behavior of monkeys, rats, and human beings. [Although this was Dr. Hutchinson's project, he was not mentioned by name during Senator Proxmire's appearance.]

On April 15, 1976, Dr. Hutchinson filed a \$6 million slander and libel action in the U.S. District Court for the Western District of Wisconsin against Senator Proxmire and his aide alleging that they "maliciously and with knowledge of the consequences of their

conduct interfered with the numerous valid contractual relationships that the plaintiff had with the supporters of his research." Dr. Hutchinson's complaint seeks relief based on the statements made in the press release, on the television show, and by Mr. Schwartz over the telephone to the various Federal agencies.

The defendants filed a motion with the court on June 10, 1976, to have the case transferred to the District of Columbia.

On June 11, 1976, the court issued an order by U.S. District Court Judge Doyle in which he disqualified himself from the action. The case was transferred to the Northern District of Illinois, since Judge Doyle was the only judge in the Western District of Wisconsin. The case was still docketed in the Wisconsin court, however, and was handled as if it were there.

Senator Proxmire filed a motion to dismiss or, alternatively, for summary judgment on July 9. In it he claimed: (1) that the alleged misconduct was legitimate legislative activity and, accordingly, absolutely privileged; (2) that his statements and inquiries about the use of public funds were privileged; and (3) that there is no factual basis which will support a finding for the plaintiff.

On December 23, 1976, the court granted defendants' motion for summary judgment, with a written opinion to be issued by January 23, 1977. Subsequently the court extended until April 27, 1977, the date for filing its memorandum.

On April 22, 1977, the court issued its opinion. It concluded that in order to determine whether Senator Proxmire should be granted summary judgment three issues had to be resolved:

"(1) Whether the investigative activities of a Senator in connection with the duties as a Member of Senate subcommittees were privileged.

"(2) Whether a press release issued by the United States Senate Service Department and containing the Substance of a Senate floor speech by the United States Senator was privileged under the Speech or Debate clause of the United States Constitution;

"(3) Whether the statements made by the United States Senator to his constituents and in a television appearance were libelous or defamatory." [Slip Opinion at 2.]

For purposes of determining the applicability of Speech or Debate clause immunity to the allegations in the complaint the court divided the actions of Senator Proxmire and Mr. Schwartz into four phases:

(1) investigation into Federal funding of Dr. Hutchinson's research;

(2) delivery of a speech on the Senate floor by the Senator and issuance of a press release reciting the facts and content of the Senate speech;

(3) follow-up investigation by the Senator and his staff at appropriation hearings; and

(4) the Senator's statement on the Mike Douglas Show, his newsletter to constituents, and his other comments about the plaintiff.

Citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975) and *Doe v. McMillan*, 412 U.S. 306, 314 (1973), the court stated that: "The standard for involving congressional immunity under article I, section 6 of the Constitution is the standard of legitimate legislative activity. In the event of a suit, once it is



determined that the conduct complained of meets that standard, the action must be dismissed." [Slip Opinion at 13.]

While noting that "considerable confusion exists as to what constitutes legitimate legislative activity," the court concluded that as to the aspects of the case related to the investigations conducted by Senator Proxmire and his staff:

In this case, Senator Proxmire serves on several subcommittees of the Senate Committee on Appropriations. These subcommittees review the budgets of the various agencies with which Dr. Hutchinson has contracted. As a member of these subcommittees, Senator Proxmire votes on appropriations, makes recommendations regarding the distribution of government funds, and concerns himself with their expenditure. Therefore, his inquiries, and those of his administrative assistant, into how American taxpayers' moneys are spent by the agencies over which the subcommittees in question had jurisdiction were privileged as legitimate legislative activity under the *Kilbourn* test [*Kilbourn v. Thompson*, 103 U.S. 168 (1881)] of "things generally done in a session of the House by one of its members in relation to the business before it." [Slip Opinion at 14.]

Addressing the problems of the speech on the floor of the Senate and the authorization of the press release the court concluded that in both instances Senator Proxmire was protected by Speech or Debate clause immunity.

In regard to the press release, the court found Senator Proxmire's contention that his authorization of the press release was entitled to immunity as an exercise of the "informing function" to be compatible with the U.S. Supreme Court's holdings in *Doe and Gravel v. United States*, 408 U.S. 606 (1972). In support of this view the court noted the existence of the franking statute, 39 U.S.C. § 3210 (1970), which "promotes the 'informing function' by authorizing free use of the mails" and cited two lower court cases dealing with the use of the frank as an exercise of the "informing function." *Hoellen v. Annunzio*, 348 F. Supp. 305 (N.D. Ill. 1972), aff'd 468 F.2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973) and *Bowie v. Williams*, 351 F. Supp. 628 (E.D. Pa. 1972). The court stated that: "That press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor." [Slip Opinion at 22.]

As to the remaining issue of whether Senator Proxmire's statement on the *Mike Douglas Show*, his references in his newsletter to Dr. Hutchinson's research and his comments to news reporters and in interviews either mentioning Dr. Hutchinson by name or merely alluding to the Doctor's work were libelous or defamatory, the court concluded they were not.

The court first found that Dr. Hutchinson was, for purposes of the suit, both a "public figure" and a "public official." Thus, for the plaintiff to recover, it must be found that not only did Senator Proxmire publish a defamatory falsehood about him, but also that the publication was made with actual malice; that is, actual knowledge of falsity or reckless disregard of the truth (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964)).

The court concluded that none of Senator Proxmire's statements met the threshold requirements set forth in the *New York Times* case.

The court next noted that: Even if for the purpose of this suit it is found that Dr. Hutchinson is a private person so that First Amendment protections do not extend to Senator Proxmire and his administrative assistants, relevant State law dictates the grant of summary judgment. Although the court was not certain which State's law would be appropriately applicable to this case, the District of Columbia's ("the place where the defendants work and their allegedly wrongful conduct originated" [Slip Opinion at 34] or Michigan's ("the plaintiff's domicile, where the inquiry presumably had effect" [Slip Opinion at 34]), it concluded that by applying the relevant law of either jurisdiction Dr. Hutchinson would be unable to recover in this action.

The court then granted Senator Proxmire's motion for summary judgment. Additionally, the court stated that unless the plaintiff could show why it should not so order, it would within 30 days dismiss the complaint against Mr. Schwartz.

On May 20, 1977, Dr. Hutchinson filed notice of appeal. On June 22, 1977, the District Court dismissed the complaint against Mr. Schwartz. The appeals were consolidated on July 29, 1977.

**The appeals were argued on January 9, 1978.**

*Status.*—The action is pending before the U.S. Court of Appeals for the Seventh Circuit.

The decision of the United States District Court for the Northern District of Illinois is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

***United States v. Helstoski***

No. 77-1423 (Third Cir.)

and,

***Helstoski v. United States***

No. 77-1800 (Third Cir.)

*Brief.*—On June 2, 1976, then-Representative Henry Helstoski was indicted by a grand jury on three counts of soliciting and accepting bribes from Chilean and Argentine aliens in exchange for introducing private citizenship bills in Congress, with the intent of delaying the aliens' deportation. The indictment also included three counts of conspiracy and obstruction of justice and four counts of lying to a Federal grand jury. Indicted with Mr. Helstoski were two members of his Congressional district staff and the treasurer of his reelection committee.

Before trial was scheduled to begin on 8 counts of a 12-count indictment, Mr. Helstoski moved to dismiss the first 4 counts. His dismissal motion was predicated upon the Speech or Debate clause, Article I, Section 6 of the U.S. Constitution. As enunciated by the court, in its opinion filed on February 18, 1977, "The defendant's position is that since the Speech or Debate clause precludes inquiry by a grand jury into the performance of his legislative acts, and

since the grand jury obviously made such an inquiry, the implicated counts of the indictment are vitiated." [*United States v. Helstoski*, Criminal Action No. 76-201 (D.N.J.); Slip Opinion at 2.]

The Government opposed the dismissal motion asserting that an indictment, valid on its face, may not be attacked on the ground that incompetent or privileged evidence was presented to the indicting grand jury. Alternatively, the Government argued that the voluntary testimony about legislative activity given by the defendant to the grand jury and during a prior trial of another individual, alleged in the contested indictment to be a co-conspirator of the defendant, constituted a waiver of Speech or Debate clause rights. Such waiver, the Government further argued, precluded Mr. Helstoski from attacking the validity of the indictment and "renders evidence of his legislative acts admissible at trial for the purpose of establishing his guilt." [Slip Opinion at 2-3.]

As to Mr. Helstoski's motion to dismiss four counts of the indictment, the court concluded that such dismissal was not required. The court noted:

Defendant Helstoski's contention that Counts I through IV of the indictment must be dismissed because the indicting grand jury heard evidence regarding his legislative acts is untenable. *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969). This is not because there is any question that a Member of Congress may not be called to answer for his legislative acts before a grand jury, *Gravel v. United States*, 408 U.S. 606 (1972), but because courts simply will not go behind the face of an indictment, once it is returned, in order to test the competency of the evidence adduced before the grand jury. *United States v. Calandra*, 414 U.S. 338 (1974); *Lawn v. United States*, 355 U.S. 339 (1958); *Costello v. United States*, 350 U.S. 359 (1956); *Holt v. United States*, 218 U.S. 245 (1910); *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966) (dictum). This rule governs whether the evidence before the grand jury is attacked on the ground it is hearsay, *United States v. Costello*, *supra*, or on the ground the evidence was obtained and set before the grand jury in violation of the Constitution, *United States v. Calandra*, *supra*; *Holt v. United States*, *supra*; *United States v. Blue*, *supra*. [Slip Opinion at 3.]

As to Mr. Helstoski's assertion that the four counts of the indictment should be thrown out because of their "express reference" to his legislative actions, the court, relying on Supreme Court decisions in *United States v. Johnson*, 383 U.S. 169 (1966), and *United States v. Brewster*, 408 U.S. 501 (1972), declared that the counts involved did not violate the Speech or Debate clause "merely because they make reference to alleged legislative acts of defendant Helstoski." [Slip Opinion at 8.]

While the court concluded that presentation of such material to the grand jury was not a proper basis for dismissing the indictment, it nonetheless rejected the Government's contention that Mr. Helstoski's pretrial testimony waived the Speech or Debate clause protection to which he was entitled at trial.

On this point the court stated:



[T]he purpose of the Speech or Debate Clause is to insulate the independent activities of the legislature from executive and judicial interference. This purpose can be achieved only if the executive is barred from utilizing evidence of legislative acts, and if the judiciary refuses to receive evidence of such acts, in a criminal prosecution of a legislator. I therefore believe that what the Speech or Debate Clause does is to erect an absolute constitutional immunity in favor of a member of Congress from having evidence of his legislative acts used in litigation against his interests. I am not certain whether a member of Congress has the power to waive this immunity. But I am certain that if such power exists, it is consistent with the constitutional obligation of the judiciary to eschew interference with the legislature that the courts employ a stringent test before finding such a waiver in a given case. A waiver of the Speech or Debate immunity ought not be found by implication. Such a waiver may be found only where it has been clearly demonstrated that a legislator has expressly waived his Speech or Debate immunity for the precise purpose for which the Government seeks to use evidence of his legislative acts. A less stringent standard would vitiate the prophylactic purpose underlying the Speech or Debate Clause. It is clear that by the above standard, Helstoski has not waived his Speech or Debate immunity from having evidence of his prior legislative acts used against him in the instant criminal prosecution. Accordingly, such evidence may not be admitted at trial on the ground of waiver. [Slip Opinion at 16-17.]

Turning to the Government's motion seeking a pretrial ruling on the admissibility of evidence the court stated the general proposition that:

[I]t is clear that the Speech or Debate Clause creates no impediment to the introduction of evidence of an agreement by Helstoski to perform in futuro a legislative act. What is forbidden is the introduction of evidence of his past performance of such an act. [Slip Opinion at 17.]

As to Mr. Helstoski's particular situation the court noted:

The Government argues, however, that Helstoski's statements, both verbally and in writing, referring to the introduction of private immigration bills, do not constitute legislative acts and thus may be admitted. The argument is beside the point. The offered evidence contains reference to Helstoski's past performance of a legislative act, and the Speech or Debate Clause forbids use of such evidence during the Government's case-in-chief. The same is true of the thesis that Helstoski's statements reciting the past performance of a legislative act may be used, not to corroborate the existence of a bribe, but on issues such as motive, intent, knowledge and the like. This ignores the absolute command of the Speech or Debate Clause as construed and applied in *Johnson and Brewster*. The clause does not say that evidence of a legislator's past perform-

ance of a legislative act may be used against him for some purpose but not others. It is, rather, that such evidence may not be used at all. If the Government, for whatever reason cannot prove its case without reference to Helstoski's past performance of a legislative act, then the prosecution will have to be foregone. [Slip Opinion at 17-18.]

The court concluded its opinion with a brief discussion of the constitutional power of the House and Senate to "Determine the Rules of Its Proceedings, punish its Members for Disorderly Behavior, and with the Concurrence of two-thirds, expel a Member." [U.S. Constitution, Article I, Section 5, clause 2.]

This power, the court declared would be an appropriate remedy for those actions of Members of Congress "where it is necessary to call into question their legislative acts in order to impose [punishment]." [Slip Opinion at 18.]

Reading the rulemaking and enforcement powers and the Speech or Debate clause together the court concluded that:

The Speech or Debate Clause expressly permits a member to be called into question before the House on account of his performance of a legislative act. If the House does not exercise the power conferred by the Constitution to discipline its own members, such a failure provides no basis for the executive and the judiciary to interfere, ignore the Constitution, and violate the doctrine of separation of powers. [Slip Opinion at 19.]

On March 18, 1977, the Government filed a notice of appeal.

On June 6, 1977, the court granted Mr. Helstoski's motion to have the Government's brief and appendix suppressed and ordered the brief and appendix resubmitted so that matters not properly subject to disclosure at that time might be filed *in camera*. Mr. Helstoski filed a petition for writ of *mandamus/prohibition* on June 17, 1977 in the Court of Appeals, asserting again that the indictment violated the Speech or Debate clause. [*Helstoski v. United States*, No. 77-1800 (3d. Cir.).] On June 28, 1977, the petition and the appeal were consolidated for purposes of argument and for disposition on the merits.

On October 6, 1977, the appeal and the petition were argued before a three-judge panel of the United States Court of Appeals for the Third Circuit.

*Status.*—The appeal and the petition for writ of *mandamus/prohibition* are pending before the Court of Appeals.

The full text of the memorandum and order of the District Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

### ***Chase v. Kennedy***

Civil Action No. 77-2652 (Ninth Cir.)

*Brief.*—Trueman E. Chase, a resident of California, who had been unable to resolve a dispute with the Social Security Administration, sent a document styled "Congress of the United States of America \* \* \* Petition for Redress" to Senator Edward Kennedy of Massachusetts, intending for Senator Kennedy to present the



petition to the Congress or one of its committees. Instead, because Mr. Chase is a resident of California, Senator Kennedy forwarded the petition to Senator Alan Cranston of California.

Senator Kennedy advised Mr. Chase that he had forwarded the petition to Senator Cranston. Mr. Chase then wrote to Senator Adlai E. Stevenson III, Chairman of the Senate's Select Committee on Ethics, protesting Senator Kennedy's action. Senator Stevenson forwarded this letter to Senator Cranston and he also advised Mr. Chase that he had done so. Upon receipt of Mr. Chase's petition at his Washington, D.C. office, Senator Cranston forwarded it to his San Francisco office.

Mr. Chase then filed this action asserting that Senators Kennedy, Stevenson, and Cranston deprived him of his First Amendment right to petition the Government for a redress of grievances.

On July 12, 1977, the U.S. District Court for the Southern District of California issued its decision. Judge Turrentine dismissed the action concluding that Mr. Chase had not been denied his right to petition the Government. Rather he "has confused his right to petition with a supposed right to have his petition granted or acted upon in a certain way. But no such right is found in the Constitution." [*Chase v. Kennedy*, Civil Action No. 77-305-T (S.D. Calif., July 12, 1977); Slip Opinion at 2.]

As to the actions of the Senators, the court concluded that whatever action a Senator determines to take with petitions is "absolutely within his discretion and is not a proper subject of judicial inquiry, even if it might appear that he may be grossly abusing that discretion." [Slip Opinion at 3.]

On July 18, 1977, Mr. Chase filed a notice of appeal. He also filed a notice of direct appeal to the United States Supreme Court on September 7, 1977, but no further action has been taken in regard to that appeal.

*Status.*—The appeal is now pending before the U.S. Court of Appeals for the Ninth Circuit.

The complete text of the court's opinion is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

### ***United States v. Garmatz***

Criminal No. H-770379 (D. Md.)

*Brief.*—On August 1, 1977, an indictment was filed in the United States District Court for the District of Maryland against former U.S. Congressman Edward A. Garmatz. The one-count indictment brought under 18 U.S.C. § 371 charged Mr. Garmatz with conspiring with others to violate 18 U.S.C. § 201(g) which prohibits public officials from accepting bribes and illegal gratuities.

The indictment alleges that Mr. Garmatz agreed to receive cash payments in exchange for certain official acts to be performed by him as a Member of Congress and as Chairman of the House Committee on Merchant Marine and Fisheries, specifically his sponsorship, support, vote and decision on certain passenger ship legislation which was within the jurisdiction of the committee he chaired.

Motions by Mr. Garmatz to dismiss the indictment and to strike surplusage from the indictment were denied by Judge Alexander Harvey in a Memorandum and Order filed on December 5, 1977.

In his opinion Judge Harvey delineated two issues raised by the defendant's motion. First, did all the acts and events of the alleged conspiracy culminate when the bill in question became law in May of 1972 as Mr. Garmatz asserted? If so, and if the court therefore granted the defendant's motion to strike as surplusage all allegations concerning acts and events which occurred after May 1972, then the 5-year statute of limitations applicable to the alleged offense would have expired prior to the return of the indictment in August 1977. Additionally, venue would not properly be in the Maryland court since the only overt acts alleged to have occurred in Maryland took place after the passage of the bill in May 1972. Thus, the judge declared, if the motion to strike surplusage were granted the court would also be required to dismiss the indictment.

Such action was not required, the judge concluded because the conspiracy did not end when the bill became law but continued. The judge noted that:

Essentially, the objective of the conspiracy here was the exchange of money for an agreement or promise to perform official acts. The government charges that pursuant to the illegal agreement, defendant solicited and received gratuities both before and after the bill became law. Thus, the objective of the conspiracy was not attained until the solicitation and exchange of all money, both before and after the legislation in question became law. [Slip Opinion at 8.]

The court further declared that:

In this particular case, a conspiracy to violate § 201(g) has been charged, not the substantive offense itself. The indictment alleges that the conspiracy still existed within the five years prior to the indictment of August 1, 1977, and that at least one overt act in furtherance of the conspiratorial agreement was committed in Maryland within that period. These allegations are clearly sufficient. [Slip Opinion at 8.]

The second issue presented by Mr. Garmatz motion to dismiss was whether prosecution of the case would contravene the Speech or Debate clause (Art. I, Sec. 6, clause 1), of the Constitution. After discussing earlier Supreme Court cases bearing on the issue the judge concluded that the Garmatz indictment did not contravene the clause. The court noted that those earlier Supreme Court decisions do not:

[B]ar an indictment under a general indictment under a general statute where the government can make a *prima facie* case without inquiring into legislative acts. *United States v. Dowdy*, *supra* at 224. Just such an indictment is before the Court in this case. Under the one conspiracy Count contained in this indictment, the essence of the offense charged is an illegal agreement to accomplish an illegal objective and guilt can be established "by proof of

the agreement, accompanied by proof of one or more non-legislative acts to carry it out, without proof of legislative acts immunized from inquiry by the speech or debate clause." *Dowdy, supra* at 227. [Slip Opinion at 14.]

Mr. Garmatz had particularly asserted that the Speech or Debate clause prohibited a prosecution for illegal solicitations pertaining to past legislative acts. This contention was rejected by Judge Harvey concluding that the case could be prosecuted "provided that the prosecution did not offer evidence of the performance by the defendant of legislative acts." [Slip Opinion at 14-15.]

Judge Harvey further declared:

\* \* \* [T]he essence of the offense charged in this case is the illegal agreement. To prove the essential elements of this indictment, there is no need for the government to inquire into how defendant Garmatz spoke, debated or voted or into anything he did in the Chamber or in committee. This indictment does not allege the performance by the defendant of any legislative acts, either as a part of the conspiracy or as overt acts committed in furtherance thereof. Furthermore, there is no need here for the government to show that defendant fulfilled the bargain, either in proving the conspiracy itself or any of the overt acts. [Slip Opinion at 15.]

Mr. Garmatz had also asserted that the validity of the indictment could be tested for purposes of the motion to dismiss by the court for conformity with the Speech or Debate clause only by examining in advance of trial the evidence to be offered by the Government. Only in that way Mr. Garmatz argued could the court determine whether evidence of legislative acts would be presented by the Government to support the allegations in the indictment.

Such a procedure was not warranted because the court concluded that the indictment complied with the requirement that:

[L]egislative acts performed by a Congressman can not be alleged or proved in a case of this sort. Moreover, counsel for the government had agreed to make proffers of the prosecution's proof prior to the trial. At that time, this Court will determine whether any of the proof to be presented at the trial includes evidence of the performance by the defendant of legislative acts. [Slip Opinion at 15-16.]

Garmatz had also asserted that the Speech or Debate clause protected him with respect to any discussions he had with any interested party which might be construed as part of the information gathering process of a Congressman or a Congressional committee. Judge Harvey declared that such assertion was not supported by the pertinent Supreme Court decisions. He concluded:

The Clause does not prohibit inquiry into illegal conduct "simply because it has some nexus to legislative functions," and the government is therefore not barred from presenting proof of "activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster, supra* at 528.

Furthermore, the Speech or Debate Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process." *United States v. Brewster*, *supra* at 517. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act." *United States v. Brewster*, *supra* at 526. Thus, discussions relating to the giving or receiving of a bribe would not be barred at the trial, nor conversations of co-conspirators which might be casually or incidentally related to legislative affairs. [Slip Opinion at 16-17.]

The court concluded its discussion of the Speech or Debate clause by declaring that:

If any proffer of evidence made in this case indicates that the government seeks to introduce direct evidence of the performance by defendant Garmatz of a legislative act, such evidence will be excluded. The question before this Court when the proffers are made will be whether the government is seeking to introduce direct evidence of the performance of a legislative act as that term was defined in *Brewster* and *Gravel*, not whether the legislative act in question was performed in the past or in the future. [Slip Opinion at 17-18.]

*Status.*—On January 9, 1978, with leave of the court, the U.S. Attorney filed an order dismissing the indictment. Appended to the order for dismissal was a copy of a letter to United States District Judge Alexander Harvey II, from Russell T. Baker, Jr., Deputy Assistant Attorney General, indicating the reason for the dismissal. According to that letter:

Between December 20 and December 29, 1977, during pretrial preparation, the New Jersey prosecutors discovered from information that they uncovered, and pursued and from information developed by Mr. Garmatz's attorney, Arnold M. Weiner, that Edward Heine, the principal government witness in the case, had withheld relevant facts and had affirmatively misrepresented other facts. In particular that witness had created false documentation to corroborate certain of his testimony and had tendered it to the government as genuine. [Order For Dismissal at 2-3.]

The December 5, 1977 memorandum and order of the District Court is printed in full in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.



### III. POWERS OF CONGRESSIONAL COMMITTEES

#### *United States v. American Telephone and Telegraph Co.*

Civil Action No. 76-1372 (D.D.C.)

*Brief.*—On July 22, 1976, the Justice Department filed this action in the District Court for the District of Columbia, seeking a temporary restraining order enjoining American Telephone & Telegraph (hereinafter "A.T. & T.") from complying with a subpoena issued by the Chairman of the House Committee on Interstate and Foreign Commerce, pursuant to a vote by the Subcommittee on Oversight and Investigations. The chairman of the subcommittee, Representative John Moss, filed a motion to intervene as a party-defendant which was granted. (Civil Action No. 76-1372 (D.D.C.))

The information sought pursuant to the subpoena included letters from the Federal Bureau of Investigation (hereinafter "FBI") to subsidiaries of A.T. & T. requesting (1) that a leased telephone line be provided at the usual commercial rate, (2) a statement that the request was made upon a specific authorization of the Attorney General for purposes of national security, (3) the phone number, location, or other information relating to the lines to be intercepted, and (4) the statement that A.T. & T. was not to disclose the existence of the request because such disclosure would obstruct and impede the investigation.

The request letter includes the phone number, address, or other information identifying the object of the electronic surveillance. Such a request is necessary because the information intercepted is moved from the point of interception, (i.e., the telephone line leading to the object structure) to the point of monitoring (which may be the local FBI office) by way of a leased telephone line, which can be installed only by A.T. & T. and its subsidiaries.

Paragraph 1 of the subpoena seeks such "national security request letters."

The return date on the subpoena was originally set for June 28, 1976, but because of continuing negotiations the compliance date was extended to July 23, 1976.

The executive branch presented the committee with an alternative proposal which the court described thus: "Under this proposal, following A.T. & T.'s preparation of an 'inventory' of the request letters held at A.T. & T., the FBI would identify by date those which were 'foreign intelligence surveillances' and those which were 'domestic surveillances.' In regard to the past domestic surveillances, the FBI would furnish to the subcommittee the memoranda on which the Attorney General based his authorization for such surveillances, with only minor deletions necessary to protect ongoing investigations. From the 'foreign intelligence surveillances,' the subcommittee could select sample items for any 2 years, and representatives of the subcommittee would be given access to the memoranda on which the Attorney General based his authorization of those surveillances with names, addresses, or



other information identifying targets and sources deleted.” [*United States v. American Telephone and Telegraph Co.*, 419 F. Supp. 454, 458–59 (D.D.C. 1976).]

President Ford “also proposed a procedure whereby verification, and resolution of any questions, would be accomplished by the direct participation of the Attorney General and if necessary by the President himself.” This proposal was rejected by Subcommittee Chairman Moss. On July 22, 1976, President Ford wrote to Representative Harley O. Staggers, Chairman of the Committee on Interstate and Foreign Commerce, stating:

I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security. Compliance with the Committee’s subpoena would, therefore, be contrary to the public interest. Accordingly, I have instructed the American Telephone and Telegraph Company, as an agent of the United States, to respectfully decline to comply with the Committee’s subpoena. [419 F. Supp. at 459.]

The suit was filed by the executive branch when it became clear that notwithstanding the President’s order, A.T. & T. was prepared to turn over the subpoenaed documents to the committee.

Chairman Moss asserted that the Speech or Debate clause of the Constitution was an absolute bar to judicial interference with a Congressional subpoena issued in the conduct of a legitimate legislative investigation.

The Justice Department countered that the suit should only be considered one seeking to restrain a private party from releasing documents in its possession. This argument was advanced, the Justice Department said, so that the court could avoid dealing with a constitutional confrontation between two of the three branches of the Federal Government. The Department argued that by following its approach the court need not consider the applicability of the Speech or Debate clause, since the immunity provided by that constitutional provision runs only to Members of Congress and their close aides when defending against a lawsuit, and does not afford any protection to a private entity such as A.T. & T.

On July 30, 1976, the court issued its decision. Rejecting the Department’s approach, the court said:

[T]o take this avenue would be to place form over substance. The effect of any injunction entered by this court enjoining the release of materials by A.T. & T. to the Subcommittee would have the same effect as if this court were to quash the Subcommittee subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee. [419 F. Supp. at 458.]

The court determined that it was confronted with a direct contest between the investigatory power of the Congress and the invocation of executive privilege. Rejecting the contentions of absolute

rights asserted by both Chairman Moss and the Justice Department, the court determined that:

Here, by nature, the extent and the relative importance of the power of one coordinate branch of government must be balanced against that of the other. Neither can be considered in a vacuum. [419 F. Supp. at 459.]

In balancing the competing interests the court noted several factors which it concluded must be considered. These included:

(1) Whether the information requested is essential to "the responsible fulfillment of the committee's functions." *Senate Select Committee v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (concerning a Congressional subpoena of executive documents not related to national security).

(2) Whether there is "an available alternative" which might provide the required information "without forcing a showdown on the claim of privilege." *United States v. Reynolds*, 345 U.S. 1, 11 (1952).

(3) The circumstances surrounding and the basis for the Presidential assertion of privilege. *Id.*: *United States v. Nixon*, 418 U.S. 683, 710-711 (1974).

The court concluded:

In the context of this case, and the court emphasizes that this decision is limited to the circumstances of this case, the court determines that there are alternative means available for obtaining the information required by the Subcommittee, that the particular form in which that information is sought is not absolutely essential to the legislative function, and that the President's determination that release of this material would present an unacceptable risk of disclosure of matters concerning the national defense, foreign policy, and national security outweighs the Subcommittee's showing of necessity. [419 F. Supp. at 460.]

In deciding to grant the permanent injunction against compliance with the subpoena, the court considered the likelihood that the subpoenaed material if turned over to the subcommittee might be made public. The court noted that the President had determined that release of the material would present an unacceptable risk to national security and foreign policy and that:

if the materials were turned over to the Subcommittee, the information could legally be released upon the majority vote of a quorum (8 Members) of the Subcommittee unless such a determination were reversed by the affirmative action of the House. In addition, each of the 435 Members of the House of Representatives would have access to such material pursuant to Rule XI(2)(e)(2) of that Chamber's Rules. The potential for disclosure of this highly sensitive information, if put into the hands of so many individuals, has been determined by the President to be an unacceptable risk. Such a determination is entitled to great weight.

The court is not implying that the Members of the Subcommittee, or of the House of Representatives, will act

negligently or in bad faith if they have access to these documents. But it does appear to the court that if a final determination as to the need to maintain the secrecy of this material, or as to what constitutes an acceptable risk of disclosure, must be made, it should be made by the constituent branch of government to which the primary role in these areas is entrusted. [419 F. Supp. at 460-61.]

Defendant-intervenors filed an appeal on August 2, 1976, with the Court of Appeals for the District of Columbia Circuit, and asked for an expedited briefing period. On August 6, 1976, the U.S. Court of Appeals for the District of Columbia set an expedited schedule and designated the case for hearing in the October 14 to November 3 session of that court.

On August 26, 1976, the House of Representatives passed House Resolution 1420, authorizing Chairman Moss to proceed in this action on behalf of the House of Representatives and the House Committee on Interstate and Foreign Commerce. Chairman Moss, on September 1, filed a motion for substitution of parties to reflect the change in his status pursuant to the House resolution. The motion was granted on September 14 and the caption of the case was changed by deleting the words "Member, United States House of Representatives," and inserting in lieu thereof "Individually and on behalf of the U.S. House of Representatives and the House Committee on Interstate and Foreign Commerce."

In his suggestion that the Appeals Court hear the case *en banc*, filed on September 17, 1976, Representative Moss set forth the issues he felt were present in the appeal:

Appellant submits that the issues presented by this appeal are of exceptional public and constitutional importance, and should be decided by the Court *en banc*. Among such issues are the following:

a. Whether the District Court erred in holding that the President has the unreviewable power to prevent Congress from receiving documents from a private company pursuant to an admittedly lawful Congressional subpoena, merely by asserting that Congress' receipt of such documents would be detrimental to national security;

b. Whether the District Court erred in issuing an injunction that requires Congress to accept the opinion of the District Court as to the manner in which Congress should exercise its discretion in conducting an admittedly lawful investigation; and

c. Whether, contrary to the decision of the District Court, Congress has the constitutional power and responsibility to inform itself as to the nature and extent of warrantless wiretapping by the executive branch within the United States. [Suggestion of Appellant for Hearing *En Banc*, filed September 17, 1976, at 4.]

In its response to the suggestion for a hearing *en banc*, the Justice Department noted:

The issue upon which this case turns is whether, under our system of government, the President of the United



States, or the House Committee on Interstate and Foreign Commerce, ultimately must determine the acceptability of recognized risks to the national security. [Response to Appellant's Suggestion for Hearing *En Banc*, filed September 23, 1976, at 1.]

On October 8th, Chairman Moss' petition for a hearing *en banc* was denied.

On December 30, 1976, the Court of Appeals issued its opinion. The court, noting that both a new House and a new President would be in office early in 1977, remanded the case to the District Court without decision on the merits. The Appeals Court expressed the hope that through further negotiations the parties could reach agreement "without requiring a judicial resolution of a head-on confrontation \* \* \*" [*United States v. American Telephone and Telegraph Co.*, 551 F.2d 384 (D.C. Cir., 1976)]; between the legislative and executive branches of Government. The Court of Appeals further ordered that the District Court report to the appeals panel within 3 months on the progress of the negotiations.

Although the Court of Appeals stated that it was not ruling on the merits of the injunction against compliance with the Congressional subpoena, it did direct the District Court to modify the injunction which it (the District Court) had issued so as "to exclude request letters pertaining to taps classified by the FBI as domestic, since there was no contention by the Executive nor any finding by the District Court, of undue risk to the national security from transmission of those letters to the subcommittee." [551 F.2d at 395.]

The parties met before U.S. District Judge Gasch for calendar calls on February 18, March 21, and April 6, 1977, to report on the progress of their negotiations. In a memorandum dated May 16, 1977, Judge Gasch reported to the Court of Appeals that the negotiations had not resulted in a resolution of the problem and that the District Court had no suggestions as to how the disputes could be resolved. Supplemental argument was heard by the Court of Appeals on June 3, 1977.

On October 20, 1977, the Court of Appeals issued an opinion in which it mandated a procedure to be supervised by the District Court in an effort to facilitate a compromise between the Subcommittee and the executive. Additionally, the Court of Appeals continued the injunction against A.T. & T., at least until the procedure it proposed has been tried and found inadequate.

Before setting forth the procedure to be followed, the court addressed two issues: 1) was judicial abstention warranted on "political question" grounds, and 2) whether judicial interference with the investigatory actions of the subcommittee was barred by the Speech or Debate clause of the Constitution.

The court first determined that judicial abstention on political question grounds was not warranted in the circumstances of this case, noting generally that the judicial branch abstains on political question grounds when it concludes that either the legislative or executive branches has the constitutional authority to make a decision that is dispositive of the dispute. Two factors were indicated in the opinion as militating against abstention. First, the dispute involved a conflict between two branches of the Government,



neither of which could be said to have an unequivocal and unilateral constitutional right to decide the matter in question. Furthermore, the court felt, effective judicial settlement of the issue was a possibility and judicial abstention would not lead to an orderly resolution of the dispute.

The court next rejected the contention that judicial interference with the actions of the investigation being conducted by the subcommittee was barred by the Speech or Debate clause. The court concluded that:

What the cases establish is that the immunity from judicial inquiry afforded by the Speech or Debate Clause is personal to Members of Congress. Where they are not harassed by personal suits against them, the clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny. [Slip Opinion at 18.]

The court then set forth its plan which it characterized as a "gradual approach \* \* \* consistent with our view that the present dispute should be regarded as a concerted search for accommodation between the two branches." [Slip Opinion at 21.]

As enunciated by the court:

Under our approach, the Subcommittee staff would select at random a sample of 10 unedited memoranda for the two sample years, and compare these with the corresponding expurgated ones. On the issue of notes, still a bone of contention, our approach would permit the staff to take notes on their impressions concerning the accuracy of the classification of the memoranda as relating to foreign intelligence surveillance and use of generic terms, but the notes would have to be left at the FBI under seal. The Subcommittee staff could report their conclusions orally to the Subcommittee. The Subcommittee would then decide whether to take a claim of inaccuracy—alleging, for example, executive abuse of the "foreign intelligence" rubric—to the District Court for resolution. If the District Court, upon in camera inspection of the original and edited memoranda and of the staff notes, found significant inaccuracy, it would take remedial action. The specifics of its actions are a matter for sound discretion. Relief might involve, for example, providing the Subcommittee staff access to a larger sample of unedited memoranda to determine whether any previously discovered inaccuracy was isolated or systematic. If the initial inaccuracy suggested deviousness, the District Court might conclude that the cooperative approach is unfruitful and unmanageable, and that the court should withdraw from its assistance to the executive by dissolving the injunction. [Slip Opinion at 22.]

The executive would be permitted to employ a substitution procedure, selecting at random another memorandum to be substituted, if any of the randomly selected original memoranda would in the opinion of the Attorney General, cause grave injury to the national security or possibly result in physical harm to any person it disclosed. The procedure could be implemented;

[B]ut only upon an *in camera* showing of two things: the accuracy and fairness of the edited memorandum, and the extraordinary sensitivity of the contents of the original memorandum to the national security. The determination of the District Court will, of course, be subject to appellate review. [Slip Opinion at 22-23.]

The court emphasized the provisional nature of the remedy it ordered, and indicated that such an approach was required given the negotiating positions of the parties and the court's desire to accommodate their substantial needs and yet refrain, if possible, from upholding either of the claims of absolute authority.

The Government filed a petition for rehearing on December 12, 1977, which was denied on the same day. In its petition for rehearing the Government sought to have the Court of Appeals clarify, or if necessary modify, its opinion of October 20, 1977, so as to indicate that it is not the intent of the court to allow counsel for the parties to participate in the *in camera* proceedings directed at verifying the need for invoking the substitution procedure.

The Court of Appeals refused to so clarify or modify its opinion and instead affirmed its intention to allow the District Court to permit participation by counsel for the subcommittee. The opinion distinguished the facts in the instant case from those in cases which have upheld *ex parte* proceedings in similar situations involving private parties:

The present case does involve the additional consideration that it is a body of the legislature that is seeking access, and that it has not only threshold legal standing but claims the high ground of seeking information for a legislative purpose. [Slip Opinion at 3.]

The court further stated:

Counsel for a legislative committee may be subject to the kind of security clearance that our decision contemplated for congressional staff, and may also be subject to a District Court's conditions on access to *in camera* material. In such respects, the participation of counsel is in aid of the court, his primary position is as an officer of the court, and he may even be precluded from consultation with his client on the matters involved. \* \* \* We have not accepted the contention that the executive determination that national security may be involved is conclusive and not subject to any further inquiry, nor have we accepted the rival claim that Congressional right of access to documents for legislative purposes is at any time absolute. If in the interest of national security the executive seeks the aid of the judicial branch, the courts are entitled to obtain, under circumscribed conditions, the aid they need for their task. [Slip Opinion at 3.]

*Status.*—The case is pending before the District Court.

The full text of the October 20, 1977 and December 12, 1977 opinions of the Court of Appeals are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

The full text of the May 16, 1977 memorandum of the District Court to the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

The full text of the December 30, 1976 opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

The full text of the July 30, 1976 memorandum and order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, August 15, 1976.

***Koniag, Inc. v. Andrus (formerly Kleppe)***

Nos. 76-1325 through 76-1334 (D.C. Cir.)

*Brief.*—These actions were filed in the United States District Court for the District of Columbia by 11 Alaskan communities challenging decisions of the Secretary of the Interior which found each of them ineligible to receive land and money under the Alaska Native Claims Settlement Act (hereinafter "Claims Settlement Act"), 43 U.S.C. § 1601 *et seq.* (Supp. III, 1973.) [Civil Action Nos. 74-1061, 74-1134, 74-1790 to 74-1795, 75-452, 75-485, and 75-1097 (D.D.C.).]

The cases were consolidated in the District Court for resolution of those questions which plaintiffs and the defendant agreed could be adequately presented on cross-motions for summary judgment.

The Claims Settlement Act sought to accomplish a fair, and rapid settlement of all aboriginal claims by Natives and Native groups of Alaska without litigation. Under it, 40 million acres of land and \$962.2 million were to be disbursed to regional corporations and villages that qualified. The Secretary of the Interior was given the responsibility of administering the program outlined in the legislation. Among his responsibilities was the final determination of which applicants were "villages", as defined by the Claims Settlement Act, which were eligible for participation in the distribution. The Secretary's regulations required the Juneau, Alaska, Area Office of the Bureau of Indian Affairs to make these determinations not later than December 19, 1973. Prior to reaching a decision, the Area Office was required to publish proposed decisions, which became final unless appealed within 30 days. Upon receipt of a protest the Area Director was to consider and evaluate it and render a decision within 30 days. These decisions then became final unless an "aggrieved party" appealed to the Secretary of the Interior by filing a notice with the Alaska Native Claims Appeal Board (hereinafter "Board"). The Secretary of the Interior reserved to himself the right to make the ultimate decision in each case.

If a case was appealed, however, a record was usually built by assigning the case to an administrative law judge from Interior, who would hear the case *de novo* in an adversary proceeding. At these hearings the "aggrieved parties" were usually represented by an attorney from the Interior Department's Solicitor's Office. The administrative law judge would hear evidence and make his decision *in camera*. The decision was forwarded *in camera* to the Board without being served on the communities. The Board made a



formal decision and submitted it to the Secretary of the Interior *in camera*. The Secretary then consulted with his staff and reached a final decision. Only then were the communities notified as to what decisions had been reached.

In these cases the Area Director issued decisions determining that the 11 communities were "villages" eligible for benefits under the Claims Settlement Act. The Fish and Wildlife Service, the Forest Service, or the State of Alaska, and certain environmental groups appealed one or another of the 11 decisions. After full *de novo* proceedings before the administrative law judge and the Board, the Secretary's decision was that three of the communities were of one class of "villages" but not of another, thus reducing the benefits to which the communities believed they were entitled. The other eight plaintiffs were determined not to be "villages" as defined by the Claims Settlement Act. The 11 communities brought actions to obtain judicial relief from the Secretary's decisions.

While the village claims were being considered by the Secretary, the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, chaired by Representative John Dingell, held hearings which were described as oversight hearings on the implementation of the Claims Settlement Act by the Department of the Interior.

Plaintiffs argued that these hearings adversely affected their position on the issues in dispute and improperly influenced the ultimate decisions by the Secretary. In particular, plaintiffs noted the appearance of Kenneth Brown, "who served as legislative counsel and chairman of the Alaska Task Force Working Committee of the Department of the Interior and was one of the Secretary's two principal advisers who reviewed the cases with him at the time he made his decision in the plaintiffs' case." [*Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360, 1371 (D.D.C. 1975).]

In a memorandum and order handed down on November 14, 1975, United States District Judge Gerhard A. Gesell ruled, *inter alia*, that the Dingell hearings were an impermissible interference with the administrative process, and that the Area Director's decisions designating plaintiffs as eligible villages should be reinstated since they were the last "untainted" decisions made before December 19, 1973, the date by which the Claims Settlement Act required decisions to be made.

The stated purpose of the hearings, the court noted, was to present a forum for discussing the implementation of the Claims Settlement Act. But, said the court:

in fact the Committee, through its chairman and staff members, probed deeply into details of contested cases then under consideration indicating that there was "more than meets the eye." The entire rule-making process was re-examined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures followed was questioned, and constantly the Committee interjected itself into aspects of the decision-making process. While representatives of Interior indicated they were very concerned about prejudice to the quasi-judicial administrative process, and the



chair on several occasions denied that it was his purpose to pressure the agencies involved, Representative Dingell stated that he was obliged to confess that he had doubts as to whether the law was being properly carried out. On key issues now in dispute before the Court, representatives of the Government were obliged to take positions as to the interpretation of the Act. A strenuous effort was made by the chairman to encourage protest and appeals, coupled with comments indicating his clear impression that all that could be done was not being done and that some of the results being reached were contrary to congressional intent. It was following this experience that settlements arranged with two of the plaintiffs \* \* \* were abandoned by the Department of the Interior because of the hearings. It should also be noted again that when the Secretary reached the crucial point of making his personal decision on the merits of cases that were investigated and criticized by the Committee he had as one of his two immediate personal advisors Mr. Brown, who had been subjected to the intervention and subtle harassment of the Legislative Branch.

\* \* \* \* \*

The Dingell hearings constituted an impermissible congressional interference with the administrative process. This situation presents a disturbing conflict between the Congress and the Executive Branch, and it is the responsibility of the Judiciary in this instance to prevent an impermissible intrusion by one branch into the domain of the other. It is no less the responsibility of the Court to protect the procedural due process rights of litigants and "to preserve the integrity of the judicial aspect of the administrative process." [*Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966).] It cannot be gainsaid that the "appearance of impartiality—the *sine qua non* of American judicial justice—" was sacrificed in this instance. *Id.* "[P]rivate litigants [have a right] to a fair trial and, equally important, [a] right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences," *id.* The appearance of justice was breached and while the complaining party is not required to shoulder the virtually impossible burden of proving whether and in what way the outcome before the agency was actually influenced by the congressional intrusion, the evidence before the Court indicates that the Dingell hearings indeed had a direct and demonstratable effect at least on the cases of [the two plaintiffs with whom the settlement with the Interior Department was abandoned]. [405 F. Supp. at 1371-1372.]

The Department of the Interior appealed each of the cases to the Court of Appeals and asked that the cases be consolidated for the purpose of appeal. The motion to consolidate was granted.

On February 23, 1977, the new Secretary of the Interior, Cecil D. Andrus, was substituted in place of Thomas S. Kleppe as a party to these appeals.

The case was argued on March 24, 1977.

The U.S. Court of Appeals for the District of Columbia Circuit issued an opinion on April 28, 1978, affirming in part and reversing in part the ruling of the District Court. In the opinion, filed for the court by Judge Robb, the Circuit Court agreed with the District Court that the appellate procedure established for the determination of appeals made under the Claims Settlement Act did not meet the requirements of due process. The Circuit Court concluded that the original procedure established by the Secretary should have permitted the parties to take exceptions to the recommended decisions of the administrative law judge and to submit briefs to the Board for its consideration. Rather than directing the reinstatement of the Bureau of Indian Affairs decisions, as the District Court had done, the Circuit Court remanded the cases to the District Court for remand to the Secretary for a redetermination of the appeals.

The decision of the District Court was reversed by the Court of Appeals in regard to the issues of standing and Congressional interference. The Court of Appeals held that the State of Alaska and Federal agencies concerned with the possible impact of determinations made by the Bureau of Indian Affairs Area Office under the Claims Settlement Act had standing under the Interior Department's regulations.

The Circuit Court's opinion rejected the holding of the District Court that the hearings "constituted an impermissible Congressional interference with the administrative process" the lingering effects of which made the usual remedy of remand to the Secretary for redetermination impossible. The Appeals Court ruled that the decision in *Pillsbury (supra)* was not controlling since in this action none of the individuals called to testify before the subcommittee was a decisionmaker as was the case in *Pillsbury*. The only possible exception, said the court, was Mr. Brown, who briefed the Secretary on the administrative appeals before the Secretary made his determinations. About Mr. Brown's appearance, the court said:

**[E]ven if we assume that the *Pillsbury* doctrine would reach advisors to the decisionmaker, Mr. Brown was not asked to prejudge any of the claims by characterizing their validity. See *Pillsbury Co. v. FTC, supra*, at 964. The worst cast that can be put upon the hearings is that Brown was present when the subcommittee expressed its belief that certain villages had made fraudulent claims and that the Bureau of Indian Affairs decisions were in error. This is not enough. [Slip Opinion at 19; this report at 227.]**

The Court of Appeals also dealt with the question of whether a letter sent by Congressman Dingell to the Secretary two days before his determination of the ineligibility of eight of the villages constituted an improper interference in the administrative process. Terming the letter a "more serious matter", the court stated:

A more serious matter is a letter that Congressman Dingell sent to the Secretary two days before he determined that eight of these villages were ineligible. The letter requested the Secretary to postpone his decisions on the cases pending a review and opinion by the Comptroller General, because it "appears from the testimony [at the hearings] that village eligibility and Native enrollment requirements of ANSCA [Alaska Native Claims Settlement Act] have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANSCA." The letter did not specify any particular villages, but we think it compromised the appearance of the Secretary's impartiality.<sup>9</sup> *D.C. Federation of Civic Assn's v. Volpe*, 148 U.S. App. D.C. 207, 222, 459 F.2d 1231, 1246, cert. denied, 405 U.S. 1030 (1972); see *Pillsbury Co. v. FTC*, *supra*, at 964. Nevertheless, a remand to the Secretary, rather than a reinstatement of the BIA decisions, is the proper remedy in this case. Assuming the worst—that the letter contributed to the Secretary's decision in these cases—we cannot say that 3½ years later, a new Secretary in a new administration is thereby rendered incapable of giving these cases a fair and dispassionate treatment. [Slip Opinion at 19-20; this report at 227-228.]

<sup>9</sup> We of course intimate no view as to the validity of the Congressman's criticism. [Slip Opinion at 19-20; this report at 227-228.]

*Status.*—The cases have been remanded to the District Court for remand to the Secretary for redetermination of the appeals.

That portion of the District Court's opinion which is of interest to the House of Representatives is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

The opinion of the Court of Appeals is printed in the "Decisions" section of this report at 209.

***Exxon Corp. v. Federal Trade Commission***

No. 77-1302 (D.C. Cir.)

***Kerr-McGee Corp. v. Federal Trade Commission***

No. 77-1303 (D.C. Cir.)

and,

***Union Carbide Corp. v. Federal Trade Commission***

No. 77-1304 (D.C. Cir.)

*Brief.*—On May 7, 1976, Union Carbide Corp. (hereinafter "Union Carbide") filed a complaint for injunctive and declaratory relief against the Federal Trade Commission (hereinafter "FTC"), and the Chairman, Commissioners, and Secretary of the FTC, to prevent the FTC from "releasing to two Congressional committees, and thus to the public, commercially sensitive trade secrets relating to plaintiffs' coal and nuclear business, which the Commission is required to keep confidential under Section 6 of the Federal

Trade Commission Act, 15 U.S.C. § 46(f), and under common law protections for trade secret information.” [Verified Complaint for Injunctive and Declaratory Relief, *Union Carbide Corp. v. FTC*, Civil Action No. 760793 (D.D.C.).] Union Carbide states that pursuant to an FTC subpoena dated January 31, 1975, they turned over to the FTC commercially sensitive data and trade secrets, and notified the FTC of the confidential nature of the data. The complaint states that Union Carbide and the FTC entered into an agreement that the FTC would give Union Carbide 10-days notice before releasing any information. On May 5, 1976, the FTC notified Union Carbide that it was considering releasing the data to the Senate Judiciary Committee’s Antitrust and Monopoly Subcommittee and to the House Interstate and Foreign Commerce Committee’s Subcommittee on Oversight and Investigations, and that the commissioners expected to vote unanimously to release the material by May 7, 1976. Furthermore, despite the 10-day notice agreement, the FTC said that Union Carbide might not receive any further notice. Union Carbide asserted that on numerous previous occasions commercially sensitive trade secret data submitted to Congressional committees and subcommittees had become public. They also alleged that if the FTC released this information it would be in violation of 15 U.S.C. § 46(f), which says the FTC may make public information it obtains “except trade secrets and the names of customers,” and that the release of the data would also violate Union Carbide’s common law right of confidentiality of its trade secrets. Union Carbide asked the court to enjoin the defendants from releasing the information to anyone outside the FTC, including, but not limited to, any committee or subcommittee of Congress, and to issue a declaratory judgment that the release of such data would violate 15 U.S.C. § 46(f) and Union Carbide’s common law right to preserve its trade secrets.

U.S. District Judge John H. Pratt issued an order on May 7, 1976, enjoining the FTC from releasing the information to any person outside the FTC until 10 days after the disposition of *Ashland Oil Co. v. FTC*, No. 76-1174 (D.C. Cir.), since it appeared to the court that the same issue was before the U.S. Court of Appeals in that case. [For a brief of *Ashland Oil Co. v. FTC*, see *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977, at 25.]

Separate complaints were filed on May 11, 1976, by Exxon Corporation (hereinafter “Exxon”) [*Exxon Corp. v. FTC*, Civil Action No. 76-0812 (D.D.C.)] and Kerr-McGee Corporation (hereinafter “Kerr-McGee”) [*Kerr-McGee Corp. v. FTC*, Civil Action No. 76-0814 (D.D.C.)] against the same defendants as in *Union Carbide*, stating that they had turned over to the FTC certain confidential data relating to uranium mining, milling, exploration and production pursuant to FTC subpoenas issued in early 1975. Their complaints state that they emphasized to the FTC the confidential nature of the information when the materials were turned over to the FTC. They further state that on May 5, 1976, the staff of the FTC notified them that the Commission was considering the imminent release of the data to the Senate Judiciary Committee’s Antitrust and Monopoly Subcommittee and/or individual members of the committee. On May 10, 1976, the staff of the FTC advised them



that the material would be turned over on May 11, 1976. Both Exxon and Kerr-McGee assert that "the record of commercially sensitive trade secret information finding its way into the public domain from Congress" shows that there is a high probability that submission of the data to a Congressional subcommittee would result in their release to the public. Both alleged that release of the information by the FTC would violate 15 U.S.C. § 46(f), 18 U.S.C. § 1905, and plaintiffs' common law right to protection of confidentiality of trade secrets. Both asked the court to enjoin the defendants from releasing the information to anyone outside the FTC, including, but not limited to, any committee or subcommittee of Congress, and to issue a declaratory judgment that the release of such information would violate 15 U.S.C. § 46(f), 18 U.S.C. § 1905, and plaintiffs' common law right to preserve their trade secrets. The plaintiffs also filed motions for injunctive order similar to the one granted in *Union Carbide*.

On May 11, 1976, Judge Pratt issued injunctions in these cases similar to the one issued on May 7, 1976, in *Union Carbide*.

On July 8, 1976, the court granted the defendants motion for an extension of time to file an answer until 20 days after a decision by the U.S. Court of Appeals in *Ashland Oil*.

On September 20, 1976, the U.S. Court of Appeals issued its decision in *Ashland Oil Co. v. FTC*, essentially affirming the decision of the District Court that the materials could be turned over to a committee of Congress, without violating 15 U.S.C. § 46(f). The Court of Appeals in *Ashland* then entered a stay of its order until it could rule on a motion for rehearing.

On October 1, 1976, Judge Pratt continued the temporary restraining orders in *Union Carbide*, *Exxon*, and *Kerr-McGee* until either he disposed of Union Carbide's motion for a preliminary injunction or the Appeals Court removed its stay in *Ashland Oil*.

On October 15, 1976, defendants filed their motions to dismiss, based upon the disposition in *Ashland Oil*.

On March 2, 1977, the Appeals Court denied the motion for rehearing in *Ashland Oil*.

On March 29, 1977, the court in *Union Carbide*, *Exxon*, and *Kerr-McGee* concluded that the transmission of data from the FTC to a Congressional committee "does not constitute public disclosure within the meaning of \* \* \* 15 U.S.C. (Supp. V) § 46(f); and that such transmission in this case would not cause irreparable harm to the plaintiff," citing *Ashland Oil*. The court denied the motions for summary judgment, granted defendants' motions to dismiss and dismissed the cases with prejudice, denied as moot the plaintiffs' motions for a preliminary injunction, and denied the plaintiffs' requests to stay the orders pending appeal.

On March 29, 1977, all three plaintiffs filed notices of appeal.

On March 30, 1977, the U.S. Court of Appeals for the District of Columbia consolidated the appeals of Exxon (No. 77-1302), Kerr-McGee (No. 77-1303), and Union Carbide (No. 77-1304) for purposes of appeal, and stayed the order of the District Court. In addition, the Senate Judiciary Committee was asked to advise the court whether it still sought the data originally requested.

On May 3, 1977, a motion by the three companies to expedite the proceedings was denied.

On May 6, 1977, the Appeals Court denied the companies motions for injunctions or stay pending appeals and vacated its stay of March 30, 1976 of the District Court's order. Chief Judge George E. MacKinnon considered it improper to surrender this material to any Member of Congress on a mere request, but felt he was bound by the decision in *Ashland Oil*.

On August 26, 1977, a *per curiam* order was filed dismissing appellant's motion for injunction pending appeal as moot.

On September 30, 1977, Congressman John E. Moss filed a motion for leave to file a brief as *amicus curiae*.

On October 25, 1977, a Clerk's order was filed granting Congressman Moss' motion for leave to file a brief as *amicus curiae* and giving appellants 14 days to file a brief in response.

Congressman Moss' brief as *amicus curiae* and appellant's brief in response thereto were both filed on October 25, 1977.

**Status.**—The consolidated appeals were argued on February 13, 1978.

The complete text of the orders of the District Court are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977, at 247 (*Union Carbide*), 243 (*Exxon*), and 245 (*Kerr-McGee*).

**Note:** In a footnote to its orders of March 29, 1977, the District Court stated that it was aware of footnote 63 in a decision by the Court of Appeals in *FTC v. Texaco*, No. 74-1547 (D.C. Cir. Feb. 23, 1977). Footnote 63 states:

We think it not unreasonable to require notice to the producers even in the event of a proposed release to Congress, since the circumstances surrounding such a disclosure cannot presently be ascertained. [See *Ashland Oil v. FTC*, 548 F.2d 977.]

The court concluded: "we believe that action to be legally and factually distinguishable from the case at bar." In *Texaco*, the FTC had undertaken an investigation to determine whether certain corporations were violating Section 5 of the Federal Trade Commission Act by deliberately understating gas reserves in southern Louisiana. After an informal investigation effort proved inadequate, the Bureau of Competition of the FTC determined that the issuance of subpoenas would be necessary, and on June 3, 1971, the Commission issued a resolution directing the use of compulsory process in a nonpublic investigation. The companies refused to comply with the subpoenas which were subsequently issued, and the FTC filed petitions for enforcement in the Federal District Court.

The companies argued that the accuracy of the gas reserves estimates had already been determined by the Federal Power Commission in ratemaking proceedings before that body prior to 1971, and therefore it was improper for the FTC to subpoena documents for the same purpose. The District Court agreed, and determined, in general, that the FTC could only receive documents from 1969-71 and could use them only to investigate the possibility of a conspiracy in reporting reserves, but could not use them to determine reserves. In addition the court ruled that the documents used in that investigation could only be reviewed by FTC personnel

assigned to that investigation, and had to be returned to the companies at the conclusion of the investigation, unless the court ruled otherwise.

A Court of Appeals panel upheld the decision of the District Court, but the panel's decision was vacated by the *en banc* Court of Appeals when it decided to rehear the case *en banc*. Among the parts of the District Court's order which the *en banc* court modified in its opinion and order of February 23, 1977, was the part dealing with protection of confidentiality of the information claimed by the companies. The *en banc* court concluded that until the FTC had a chance to review the documents and rule on specific requests of confidentiality the District Court's order was premature and improper. They continued:

Accordingly, we accept with some modifications, the FTC's proposed confidentiality protection, which would provide notice to the producers of any FTC decision. Specifically, we order that the FTC not disclose any of the documents produced which a company designates as confidential to any person [fn. 63] outside the employ of the FTC (other than an outside consultant retained by the FTC who has agreed not to disclose the documents) without first giving the company ten days' notice of its intention to do so. Such a procedure would, of course, provide an opportunity for judicial review at some later date, if the producers believe that a particular proposed disclosure is improper. [*FTC v. Texaco*, No. 74-1547 (D.C. Cir. Feb. 23, 1977); Slip Opinion at 43-44.]

***American Public Gas Association v. Federal Energy Regulatory Commission* (formerly Federal Power Commission)**

No. 77-695 (U.S. Supreme Court)

and,

***Amerada Hess Corporation v. Federal Energy Regulatory Commission* (formerly Federal Power Commission)**

No. 77-697 (U.S. Supreme Court)

*Brief.*—On December 4, 1974, the Federal Power Commission (hereinafter "FPC") issued an order instituting proceedings to prescribe rules and regulations establishing just and reasonable rates for jurisdictional (interstate) sales of natural gas dedicated to interstate commerce on or after January 1, 1975, to and including December 31, 1976, and otherwise regulating such jurisdictional sales by natural gas producers on a nationwide basis. All interested persons were asked to file comments and replies by certain dates, although several extensions of these deadlines were later granted by the FPC.

The FPC did not propose specific rates in its notice but stated it would rely on responses by the parties and Commission staff. The order designated as respondents all interstate pipeline companies, and all producers with jurisdictional sales exceeding 10 million Mcf per annum, who have since participated as Indicated Producer Respon-



dents. Ultimately some 46 parties and groups of parties, representing all segments of the natural gas industry and the consuming public, filed written comments and cross-comments on a host of matters. [*American Public Gas Association v. FPC*, Nos. 76-2000 *et al.* (D.C. Cir. June 16, 1977); Slip Opinion at 15. (Footnote omitted).]

On July 27, 1976, the FPC issued Opinion No. 770 in which it made a number of findings in relation to the pricing of natural gas. It then issued clarifying orders in September and October 1976, and Opinion No. 770-A on November 5, 1976. In Opinion No. 770-A, the FPC set rates which were lower than those it had set in Opinion No. 770, but which were higher than those in effect at that time. The FPC estimated that the impact of the rates set in Opinion No. 770-A would be from \$1.49 to \$1.78 billion during the following 12 months.

Appeals were filed in the U.S. Courts of Appeals in almost every circuit, and the cases were consolidated and heard by the District of Columbia circuit. Basically, the consumer petitioners complained that the rates were set too high. Their attack contested the use by the FPC of the informal notice-and-comment rulemaking proceeding "for an enterprise of such magnitude and complexity" [Slip Opinion at 26] as well as the weight given by the FPC to other factors considered in determining the new rates. The producers basically claimed that the rates were set too low.

In the meantime, on August 26, 1976, after Opinion No. 770 had been issued, Senators James Abourezk, John Durkin, and William Proxmire, and Representatives Berkley Bedell, William Brodhead, Michael Harrington, Herbert Harris, William Hughes, Andrew Maguire, Toby Moffett, John Moss, James Oberstar, Richard Ottinger, John Seiberling, and Gerry Studds (hereinafter "the Congressional parties") together filed a petition for a rehearing on Opinion 770 with the FPC. The next day the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce of the House of Representatives held hearings on the "Federal Power Commission Rate Decision."

Four members of the subcommittee—Chairman Moss and Congressmen Ottinger, Maguire, and Moffett—were parties to the petition filed with the FPC the day before the hearings. FPC Chairman John Dunham, in his testimony before the subcommittee, stated that he was concerned about the possibility that reconsideration of Opinion No. 770 might be precluded because of the appearance of the commissioners before the subcommittee, based on *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). Chairman Moss said that the subcommittee hearing should proceed and that the *Pillsbury* doctrine would not be violated by questioning the commissioners, even though he and three other subcommittee members were adversary parties. In his opening statement, Chairman Moss discussed the *Pillsbury* decision and noted that because the circumstances in that case were distinguishable, the proceedings conducted by his subcommittee would not be precluded by that decision.

On September 2, 1976, 6 days after the conclusion of the hearings, Chairman Moss reiterated his view that the commission's decision showed a "flagrant disregard" of the law, and stated that he was considering the possibility of instituting impeachment pro-



ceedings against the three commissioners who had joined in the issuing of Opinion No. 770.

On November 5, 1976, the FPC issued Opinion No. 770-A in which it set a price for the biennium 1973-74 at 93 cents instead of the \$1.01 rate set in Opinion No. 770, and narrowed the eligibility for the new higher rates.

Along with all of the other appeals filed with U.S. Courts of Appeals, the original Congressional parties, joined by Representatives Les Aspin and Christopher Dodd, filed a petition in the U.S. Court of Appeals for the District of Columbia circuit. They stated that they believed the new rates established by Opinion 770-A were still too high, and they asked the Appeals Court to set aside the decision of the FPC. [*Abourezk v. FPC*, No. 76-2001 (D.C. Cir.).] Their appeal was consolidated with the others.

In its initial brief in these cases, the Indicated Producer Petitioners and Intervenors (hereinafter "IPPI") argued, *inter alia*, that under the *Pillsbury* doctrine the FPC was disqualified to issue 770-A. The IPPI asserted that the appearance of four of the FPC's commissioners at the hearings before the subcommittee, where they were "subjected to detailed examination as to the thought processes by which they arrived at Opinion No. 770 and the reasoning and logic utilized in the opinion" [Joint Initial Brief of Indicated Producer Petitioners and Intervenors at 15. *American Public Gas Association v. FPC*, Nos. 76-2000 *et al.* (D.C. Cir.)], should have, under the *Pillsbury* doctrine, disqualified these commissioners from further consideration of the matter, thus requiring the reinstatement of Opinion 770.

On March 23 and 24, 1977, the U.S. Court of Appeals for the District of Columbia circuit heard oral argument, and on June 16, 1977, it issued its opinion affirming the orders of the FPC.

Regarding the decision of the FPC on its rehearing, the Appeals Court decided that the FPC was not disqualified from issuing Opinion No. 770-A.

The court first noted the timing of the hearings and that "[t]he questioning was not confined to explication of 'what the opinion means and what its implications are.' Chairman Moss went further, stating:

I am most committed as an adversary. I find that I am outraged by Order 770. I find it very difficult to comprehend any standard of just and reasonableness in the decision and I would not want the record to be ambiguous on that point for one moment." [Slip Opinion at 102.]

Next, the court reviewed the facts in the *Pillsbury* case, in which several of the commissioners of the Federal Trade Commission (hereinafter "FTC") had been severely criticized at committee hearings by Members in both the House and Senate for their decisions regarding enforcement of the Clayton Antitrust Act against Pillsbury. The hearings took place at a time when the FTC was considering changing its prior decision in a proceeding against Pillsbury. The court, reviewing the FTC's decision in that case, held that the FTC's subsequent consideration and decision had not been consistent with due process of law and set aside the latter decision.

The present court refused to distinguish the two cases on the basis of the type of administrative proceeding involved, ratemaking in this action, adjudication in *Pillsbury*, stating:

We doubt the utility of classifying the rate-making undertaken in the present proceedings by the Power Commission as entirely a judicial or a legislative function, or a combination of the two, for in any event the need for an impartial decision is obvious. See Davis, *Administrative Law Treatise*, § 7.03. Congressional intervention which occurs during the still-pending decisional process of an agency endangers, and may undermine, the integrity of the ensuing decision, which Congress has required be made by an impartial agency charged with responsibility for resolving controversies within its jurisdiction. Congress as well as the courts has responsibility to protect the decisional integrity of such an agency. [Slip Opinion at 104-105.]

However, the court concluded, the producers had to be denied relief under the circumstances here because they had failed to raise their objections before the FPC. They had been fully aware of these facts while Opinion No. 770 was being reconsidered, but not only did they not argue that the FPC should be disqualified, thus giving all parties—including the FPC—an opportunity to reply to the charges, but they had also actively participated in the proceedings, urging the FPC to make a new decision more favorable to their interests. The court said that parties cannot wait until a decision is made to assert disqualification—it must be asserted as soon as the party becomes aware of the grounds. The court also cited 15 U.S.C. § 717r which says that no objection to an order of the FPC can be asserted on appeal which has not been asserted before the FPC.

The court additionally stated that:

Independent of the status of the parties seeking relief, we think it is obvious that within the equitable relationship between the reviewing court and the agency there resides—there inheres—judicial jurisdiction, and responsibility in the public interest, to decide whether there occurred here such an inroad upon the integrity of the decisional function of the independent agency as to require the court *sua sponte* to set aside the whole or any part of Opinion No. 770-A. [Slip Opinion at 106-107.]

The court then considered all of the facts in the case, including the fact that the FPC's original ruling on an income tax component was heavily criticized in the hearings but was left standing in Opinion No. 770-A, that there was no indication that the provisions of Opinion No. 770-A were influenced by the subcommittee proceedings, and that there was no appearance of partiality on the part of the commissioners. In view of these circumstances, the court refused to set aside any part of the opinion *sua sponte* because of the subcommittee hearings.

The court then said:

In concluding as above, we recognize the possibility, but not the probability, that what occurred may have influ-

enced the Commission. We consider the intervention through the Subcommittee regrettable and quite inconsistent with that due regard for the independence of the Commission which Congress and the courts must maintain. Nevertheless, when weighed in the context of the record as a whole, the possibility of influence upon the Commission is too intangible and hypothetical a basis for this court of its own motion to nullify Opinion No. 770-A. We think rather that the interests of the parties and the public are to be served by our review of the Opinion under the applicable statutory standards and decisions of the Supreme Court. [Slip Opinion at 107.]

On July 18, 1977, the Congressional parties filed a motion for a rehearing *en banc*, as did several other parties.

On August 17, 1977, a *per curiam* order was filed denying the petitions for rehearing filed by the Congressional petitioners, American Public Gas Association *et al.*, Austral Oil Company Incorporated and Aztec Oil, and the Commonwealth of Pennsylvania. Separate statements on rehearing were filed by Senior Circuit Judge Leventhal, who was joined in his statement by District Judge Gesell.

Another *per curiam* order was also filed on August 17, 1977, denying all suggestions for rehearing *en banc* filed in these cases.

On November 15, 1977, American Public Gas Association and Amerada Hess filed petitions for writ of *certiorari* in the U.S. Supreme Court.

**Status.**—The petitions for writ of *certiorari* were denied on February 27, 1978.

The complete text of the order of August 17, 1977, denying the petitions for rehearing and the separate statements are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

### **United States v. Berrellez (New Case)**

Criminal Case No. 78-00120-01 (D.D.C.)

**Brief.**—On March 20, 1978, a six-count information was filed in U.S. District Court for the District of Columbia against Robert Berrellez. The first count charges the defendant with a violation of 18 U.S.C. § 371 (Conspiracy). Specifically, Mr. Berrellez is charged with conspiring with Harold V. Hendrix, who is not charged in the information, and other persons from March 1972 to March 21, 1973, to: (1) obstruct a proceeding of the Subcommittee on Multinational Corporations of the Committee on Foreign Relations of the U.S. Senate (hereinafter "Subcommittee"), (2) commit perjury, and (3) defraud the United States of and concerning its right to have the business of the Subcommittee conducted honestly and impartially. The second count charges the defendant with violating 18 U.S.C. § 1505 (Obstruction of Proceedings) by giving false and blatantly evasive testimony before the Subcommittee concerning communications and relationships between employees, officers, and directors



of the International Telephone and Telegraph Corporation (hereinafter "ITT") and Central Intelligence Agency (hereinafter "CIA") officials and communications and relationships between employees, officers and directors of ITT and certain Chileans. The third and fourth counts charge defendant with violating 18 U.S.C. § 1621 by committing perjury before the Subcommittee. The fifth count charges the defendant with perjury before a panel of arbitrators of the American Arbitration Association (hereinafter "Panel"). Mr. Berrellez had testified in June 1974, before the Panel, which was seeking to ascertain, in the course of conducting an arbitration proceeding, what activities of ITT were undertaken in Chile and elsewhere with regard to the 1970 Chilean Presidential election. On the basis of the same testimony upon which count five is based, the sixth count charges Mr. Berrellez with violating 18 U.S.C. § 1001 by knowingly and willfully making false and fictitious statements and representations as to material facts in connection with a matter within the jurisdiction of an agency of the United States, specifically, the Overseas Private Investment Corporation.

Defendant pleaded not guilty on March 29, 1978.

On April 27, 1978, defendant moved to dismiss the information.

*Status.*—The case is pending before the District Court.

#### *United States v. Gerrity* (New Case)

Criminal Case No. 78-00121-01 (D.D.C.)

*Brief.*—On March 20, 1978, a six-count information was filed in U.S. District Court for the District of Columbia against Edward J. Gerrity, Jr. The first count charges the defendant with violating 18 U.S.C. § 1505 (Obstruction of Proceedings) by giving false and blatantly evasive testimony before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations of the United States Senate (hereinafter "Subcommittee") in March and April of 1973. The testimony was given in the course of an investigation being conducted by the Subcommittee into actions by or on behalf of the International Telephone and Telegraph Corporation (hereinafter "ITT") in relation to the course of the Presidential election in Chile in 1970. The second and third counts, also arising from defendant's testimony before the Subcommittee, charge him with violating 18 U.S.C. § 1621 (Perjury). The fourth count charges Mr. Gerrity with a violation of 18 U.S.C. § 1622 by suborning perjury by Harold V. Hendrix in testimony before the Subcommittee. The fifth count charges the defendant with perjury before a panel of arbitrators of the American Arbitration Association (hereinafter "Panel"). Mr. Gerrity had testified in June 1974, before the Panel, which was seeking to ascertain what activities of ITT were undertaken in Chile and elsewhere with regard to the 1970 Chilean Presidential election. On the basis of the same testimony upon which count five is based, the sixth count charges Mr. Gerrity with violating 18 U.S.C. § 1001 by knowingly and willfully making false and fictitious statements and representations as to material facts in connection with a matter within the jurisdiction of an agency of the United States, specifically, the Overseas Private Investment Corporation.

Defendant pleaded not guilty on April 28, 1978.

*Status.*—The case is pending before the District Court.





#### IV. CONSTITUTIONAL POWERS OF THE CONGRESS

##### *Chadha v. Immigration and Naturalization Service*

No. 77-1702 (9th Cir.)

*Brief.*—This is a petition for review of an order of the Immigration and Naturalization Service (hereinafter "INS"). The INS had promulgated an order which exempted the petitioner, Jagdish Rai Chadha, from deportation as an alien. That order was subsequently vetoed by the passage of a resolution by the U.S. House of Representatives. A new order which required Chadha's deportation was then issued. The petition challenges the constitutionality of the "one-House veto" by which the original order was overturned.

As set out in petitioners' brief, the facts are these: Petitioner was born and raised in Kenya, although his race was East Indian. In 1966, he was issued a passport to the United Kingdom. He was lawfully admitted to the United States as a student in 1966 and continuously resided in the United States since that time, except for one short trip to Canada.

After obtaining B.S. and M.A. degrees from an Ohio university, he discovered that neither the United Kingdom nor Kenya would allow him to return because of his race. He moved to California in 1971 to seek work but was unable to obtain work because he did not have lawful status in the United States. However, the petition asserts, he was able to meet expenses from personal savings and from financial help from his family overseas.

Since his visa had expired in 1972, he was summoned to show why he should not be deported pursuant to section 241(a)(2) of the Immigration and Nationality Act (hereinafter "INA"), 8 U.S.C. § 1251(a)(2). A hearing was held before an immigration judge on January 11, 1974, at which Mr. Chadha requested a suspension of deportation pursuant to section 244(a)(2) of the INA, 8 U.S.C. § 1254(a)(2). Evidence presented as to his good character was uncontested.

On June 25, 1974, the immigration judge issued his decision, ordering that the deportation be suspended pursuant to section 244(a)(1) of the INA.

Section 244(a)(1) of the INA provides that suspensions may be granted when an alien (1) has been physically present in the United States for at least 7 years immediately preceding his application, (2) is of good moral character, and (3) would suffer extreme hardship if deported. (Although this authority is granted to the Attorney General, it has been delegated to the "immigration judges," with an appeal to the Board of Immigration Appeals.)

Once the decision to suspend deportation is made, notice of the action is transmitted to Congress with a detailed explanation and justification for the decision. The suspension does not become effective until the close of the session of Congress following the one in which the decision is transmitted, and then it only becomes effective.

tive if during both sessions neither House has passed a simple resolution disapproving the decision, pursuant to 8 U.S.C. § 1254(c)(2).

Mr. Chadha and five aliens whose deportation had been suspended by immigration judges lost their suspensions when on December 12, 1975, the House of Representatives passed H. Res. 926, 94th Cong., 1st Sess. (1975).

On August 4, 1976, the immigration judge ordered Mr. Chadha deported in view of the House resolution, and on appeal to the Board of Immigration Appeals, the Board affirmed the order of deportation on February 11, 1977.

Mr. Chadha filed a petition for review of the deportation order with the U.S. Court of Appeals for the Ninth Circuit on July 18, 1977. The filing of the petition automatically stayed his deportation.

The petition challenges the constitutionality of the one-House veto. It argues that neither the constitutional provisions granting Congress the power to regulate immigration nor the "Necessary and Proper" clause empowers Congress to contravene other constitutional provisions, and it asserts that the one-House veto does this in three ways. First, it says, the one-House veto violates the separation of powers doctrine. Petitioner claims the constitutional history of this doctrine demonstrates that one branch cannot perform the functions or control the performance of another, and that since the one-House veto allows a single House of Congress to perform nonlegislative functions and control the actions of an executive agency, it is unconstitutional.

Next, Mr. Chadha argues, the one-House veto deprives the President of the opportunity to exercise his veto power under Article I, Section 7. The Framers of the Constitution intended that a single executive would be given the opportunity to veto every Congressional action having the effect of law, but, since the one-House veto is not subject to Presidential veto, it is unconstitutional.

Finally, petitioner asserts that the one-House veto provision violates the requirement of a bicameral legislature. According to petitioner, the Framers of the Constitution intended that every power of the legislative branch not expressly granted to a single House must be exercised by both concurrently. Therefore, since the one-House veto provision allows a single House to make law without the concurrence of the other, it is unconstitutional.

On October 27, 1977, respondent INS filed a suggestion to invite the submission of *amici curiae* briefs by the U.S. Senate and House of Representatives.

Clerk's letters were sent on November 17, 1977, inviting the President of the Senate and the Speaker of the House to file briefs *amicus curiae* within 30 days.

On February 27, 1978, an *amicus curiae* brief on behalf of the Senate, pursuant to Senate Resolution 338 of the 95th Congress and a separate *amicus curiae* brief on behalf of Representative Frank Thompson, Jr., Chairman of the Committee on House Administration of the U.S. House of Representatives were filed. Each of the briefs opposed Mr. Chadha's petition and contended, *inter alia*, that the one-House veto is constitutional and that Chadha

**lacked standing to challenge the constitutionality of the one-House veto.**

*Status.*—The petition is pending before the U.S. Court of Appeals for the Ninth Circuit.

### ***Nixon v. Sampson***

Nos. 75-2194, 75-2195, 75-2196, 77-2123, 77-2124, 77-2125 (D.C. Cir.)

Civil Action Nos. 74-1518, 74-1533, 74-1551 (D.D.C.)

*Brief.*—Following the resignation of former President Richard M. Nixon, the special prosecutor's office advised counsel to President Ford and counsel to Mr. Nixon of its continuing interest in Presidential materials and tape-recorded conversations housed in the White House, the Executive Office Building, and elsewhere, which were relevant to investigations and prosecutions within the jurisdiction of the special prosecutor. Thereafter counsel for President Ford requested an opinion from then-Attorney General William B. Saxbe on the issues of ownership of the Presidential materials and tapes and the responsibilities of the Ford Administration with respect to them. A response to that request indicated that in the opinion of the Attorney General, the Presidential materials and tapes belonged to Mr. Nixon, but the Government had a right to use said materials. Following that advisory opinion a "depository agreement" (Nixon/Sampson agreement) was signed by Mr. Nixon and Arthur F. Sampson, Administrator of the General Services Administration (hereinafter 'GSA'), on September 7, 1974.

Thereafter, Jack Anderson, a well-known columnist, and others filed a petition with GSA seeking access to these materials pursuant to appropriate provisions of the Freedom of Information Act. The petitions were denied by GSA.

On October 17, 1974, Mr. Nixon filed a suit against Mr. Sampson and others in the United States District Court for the District of Columbia seeking a temporary restraining order and preliminary injunction to compel compliance with the Nixon/Sampson agreement and to prevent unauthorized access to the materials and tapes. Mr. Anderson, and the special prosecutor, and others moved to intervene, seeking a temporary restraining order and preliminary injunction to prevent the implementation of the Nixon/Sampson agreement. U.S. District Judge Charles R. Richey issued a temporary restraining order on October 21, 1974, prohibiting the implementation of the agreement until a full hearing could be held on Mr. Nixon's motion for a preliminary injunction. [*Nixon v. Sampson*, Civil Action No. 74-1518 (D.D.C.).]

On October 21, 1974, a suit was filed by The Reporters Committee for Freedom of the Press, and several other parties, to gain access to these materials. [*The Reporters Committee for Freedom of the Press v. Sampson*, Civil Action No. 74-1533, (D.D.C.).]

Then, on October 24, 1974, Lillian Hellman and several other individuals also filed suit to gain access to the materials. [*Hellman v. Sampson*, Civil Action No. 74-1551 (D.D.C.).]

Mr. Nixon filed a motion on October 29 to consolidate the three cases, which the court did by an order issued on October 31, 1974.



[Hereinafter these three cases will be referred to as the "consolidated cases."]

A petition for leave to participate as *amici curiae* in these cases was filed and granted on behalf of then-Senator Sam J. Ervin, Jr., Senators Gaylord Nelson and Jacob Javits, then-Representative Wayne L. Hays, and Representative John Brademas on November 11, 1974. The Congressional petitioners sought leave to participate in the proceedings in order to bring to the attention of the court "their intense interest—as Members of Congress having 'special responsibility with pending legislation dealing with the subject matter' before the court—in the maintenance of the *status quo* pending consideration by the Congress of matters falling within its primary and fundamental authority." [Memorandum of Ervin *et al.* as *amici curiae*, *Nixon v. Sampson*, Civil Action No. 74-1518 (D.D.C.).]

At the time of the filing of the Ervin petition the Senate had passed a bill, S. 4016, which, while making no determination as to the ownership of the Presidential materials, provided for the preservation of access to materials by placing them under the control of the Administrator of GSA, with all the materials to remain in Washington, D.C. The bill had been transmitted by the Senate to the House and referred to the appropriate House committee which had not then had an opportunity to act on it.

Each of the Congressional participants—the *amici*—bore a special responsibility with regard to this legislation. As noted in a memorandum prepared on their behalf:

Amicus Ervin, Senator from North Carolina, is Chairman of the Senate Committee on Government Operations, which has jurisdiction over such legislation in the Senate. Amicus Nelson, Senator from Wisconsin, is the sponsor of the pending bill. Amicus Javits, Senator from New York, is an original co-sponsor thereof. Amicus Hays, Representative from Ohio, is Chairman of the Committee on House Administration, which has jurisdiction over such legislation in the House. Amicus Brademas, Representative from Indiana, is Chairman of the relevant Subcommittee of the House Administration Committee. [*Id.*]

The action sought by the *amici* was set out in this language:

Amici respectfully urge that the safeguarding of these materials pending Congressional action is a matter of the most compelling public interest. Accordingly, in light of these considerations of fundamental significance to amici and their colleagues in the legislative branch, amici urge that the Court grant a preliminary injunction to maintain the *status quo*. Such an injunction will insure an opportunity for orderly consideration of the issues by the representatives of the public in the exercise of their special Constitutional responsibilities as trustees of the people. It will insure that nothing untoward can happen to these materials while the people's representatives decide how best to exercise their responsibilities. [*Id.*]

A separate motion by Representative Elizabeth Holtzman for leave to file an *amicus* brief was also granted on November 11,

1974. Although the Holtzman petition fully supported the *status quo* position of the Ervin petition, Ms. Holtzman's memorandum was submitted for another purpose—to call to the court's attention the fact that the principal issue in this action was the ownership of the tapes and papers. Ms. Holtzman contended that since the Attorney General had already expressed his opinion in writing that all of the disputed papers and tapes belonged to Mr. Nixon, the "level of vigor" with which the Department of Justice would pursue the defense of any action brought by Mr. Nixon—to obtain either the return of, or compensation for, the property which both he and the Attorney General already agreed were his—would be less than adequate. Moreover, she maintained that the matter was further complicated because the Department was currently representing Mr. Nixon in several suits brought against him while he was President, thus raising an ethical question as to whether it could represent his adversary (the United States) in litigation over the ownership of the papers and tapes in question. To remedy the situation, Ms. Holtzman informed the court that she intended to introduce legislation to provide for a Special Counsel, in lieu of the Department of Justice, to represent the United States in all litigation relating to the ownership of the papers and tapes at issue in this case.

Judge Richey held a hearing on the petitions on November 15 and 18, 1974, but withheld any decision and asked counsel for *amici* to provide him with additional information regarding the effect of the pending lawsuit on the bill then before the Congress.

Subsequently, after a series of amendments, the Congress passed S. 4016, on December 9, 1974. The bill, the Presidential Recordings and Materials Preservation Act (hereinafter "Act"), was signed into law on December 19, 1974 [Pub. L. 93-526].

On the day after the Act went into effect, Mr. Nixon brought an action in the U.S. District Court for the District of Columbia to enjoin its enforcement on the grounds that it transgressed the Constitution. [*Nixon v. Administrator of General Services*, Civil Action No. 74-1852 (D.D.C.), filed Dec. 20, 1974.] At the same time, Mr. Nixon asked that a three-judge court be convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear and determine the constitutional claims asserted. The case was assigned to Judge Richey, before whom the consolidated cases were then pending. The same issues, namely, the ownership of the materials and tapes and privilege against their disclosure, which were raised in the consolidated cases, were then extended to Mr. Nixon's more recent challenge. On January 3, 1975, Mr. Nixon moved for a preliminary injunction against operation of the Act.

It was alleged that on five separate occasions, during the 5 weeks following institution of Mr. Nixon's action of December 20, 1974, Mr. Nixon had requested Judge Richey to initiate the statutory procedure leading to the formation of a District Court of three judges. During that period, Judge Richey was preoccupied with the consolidated cases and planned to complete work on them before turning his attention to the challenge case. [*Nixon v. Administrator of General Services*, *supra*.]

Having failed to convince Judge Richey that the appointment of a three-judge court took priority in this matter, Mr. Nixon filed a

petition for a writ of *mandamus* in the U.S. Court of Appeals for the District of Columbia circuit, directing Judge Richey to grant the application for a three-judge court immediately and give the challenge case priority over the consolidated cases as assertedly required by section 105(a) of the Act. [*Nixon v. Richey*, No. 75-1063 (D.C. Cir.).]

The Appeals Court, in a *per curiam* order and opinion filed January 31, 1975, denied Mr. Nixon's petition, stating that the issuance of a writ of *mandamus* was unnecessary. It held, however, that Judge Richey erred in delaying action on the application for a three-judge panel. Although the court stated that an application for the convening of such a court is statutorily entitled to expeditious treatment under 28 U.S.C. § 2284, it held that beyond these considerations, the Act requires the trial judge to give priority to such an application. It declared:

Beyond these considerations, the Recordings and Materials Act independently supports petitioner's claim that the District Judge should have acted weeks ago on the three-judge application. Section 105(a) of the Act confers upon the District Court for the District of Columbia "exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title," and specifically provides that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution. \* \* \*" (emphasis supplied). It is clear that the case for which petitioner sought the three-judge court was a "challenge to the legal or constitutional validity of" the Act. It is equally clear that, as an integral part of his "challenge," petitioner's application for such a court was "a matter requiring immediate consideration and resolution. \* \* \*" In these views, we need not consider contentions by one of the *amici curiae* that §§ 2282 and 2284 are inoperable in the situation at bar. [*Nixon v. Richey*, 513 F.2d 427, 429 (1975).]

Although the court acknowledged the propriety of the *mandamus* remedy under the circumstances, it saw no occasion for issuance of a writ, since, having advised the district judge of the relevant law, it assumed the lower court would proceed in accordance with the appellate opinion.

On the same day the Appeals Court issued its order and opinion, January 31, 1975, Judge Richey released a 98-page opinion in the consolidated cases. [*Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975).] At the same time, Judge Richey issued a summary and synopsis of his opinion which appears in its entirety as follows:

#### SUMMARY AND SYNOPSIS OF OPINION OF CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

##### *A. Introduction*

These consolidated cases present a unique controversy, the heart of which concerns the ownership of and the right

to assert or waive a privilege with respect to the "Presidential materials and tape-recorded conversations" of the Nixon Administration.

These actions are before the Court on the following motions: plaintiff Nixon's motions to dismiss the Hellman, *et al.*, and Anderson suits for lack of standing; the government defendant's motion to dismiss all the actions, except that by the Special Prosecutor, on the ground that they are moot; and on motions for summary judgment or partial summary judgment by plaintiffs Anderson, The Reporters Committee for Freedom of the Press, *et al.*, Lillian Hellman, *et al.*, and the Special Prosecutor, on his counterclaim for declaratory relief, and as the intervenor-defendant in *Nixon v. Sampson et al.*, (C.A. No. 74-1518).

### *B. Standing*

The Court finds that plaintiffs Anderson, Hellman, *et al.*, and The Reporters Committee for Freedom of the Press, *et al.*, have standing to sue under the Freedom of Information Act and to challenge the Nixon-Sampson Agreement of September 7, 1974.

### *C. Justiciability*

The Court finds that although the Presidential Recordings and Materials Preservation Act of December 19, 1974, nullifies the Nixon-Sampson Agreement of September 7, 1974, the said Act does not resolve the basic questions of ownership of the Presidential materials and tape recordings, nor whether the former President may assert any privilege in regard thereto. Therefore, the questions of ownership and privilege must be decided by this Court. Furthermore, the Court has decided the additional issue raised by the pleadings with regard to Mr. Nixon's asserted Fourth Amendment claims.

### *D. Summary Judgment*

Because the Court finds that there are no genuine issues of material fact in dispute in these proceedings, the parties are clearly entitled to summary judgment on the issues as a matter of law.

### *E. Ownership*

1. The claim of ownership of former President Nixon to the "Presidential materials and tape-recorded conversations" of the Nixon Administration is contrary to the general principle of law that that which is generated or kept in the administration and performance of the powers and duties of a public office belongs to the government.

2. Former President Nixon's assertion of ownership of the documents, papers, tapes, and other materials gener-



ated or retained by himself or others on his behalf in the performance of his duties as the President of the United States is contrary to the nature of the Office of the President and the Constitution.

3. The inherent continuity of the Office of the President negates a claim by former President Nixon that the independence of the Office requires that his assertion of ownership be sustained.

4. There is no precedent which compels a finding that the "Presidential materials and tapes" are the personal property of former President Nixon.

5. The historical practice of past Presidents does not evidence a clear and constant recognition of ownership of the materials generated and retained in the conduct of the Office of the President.

6. Congress has not sanctioned the personal ownership of "Presidential materials and tapes" generated and retained in the conduct of the Office of the President.

7. Materials and tape-recorded conversations generated by Executive departments and agencies, although subsequently transferred to and currently located in the White House, are "records" within the meaning of the Freedom of Information Act, and the public has a right of access thereto; however, materials and tape-recorded conversations generated by the President and his personal aides are not "records" within the meaning of the Freedom of Information Act and, thus, are not available to the public under the Freedom of Information Act.

#### *F. Privilege*

A former President may not assert or waive the privilege which attaches to the confidential communications relating to the conduct of the Office of the President contained in Presidential materials and tape recordings as the privilege belongs to the government and may only be asserted or waived by the incumbent President.

#### *G. Fourth Amendment*

1. Mr. Nixon's Fourth Amendment rights have not been violated because the November 9th Agreement is not a general warrant; nor does it subject him to an unreasonable search and seizure. However, under the circumstances, Mr. Nixon's right of privacy must be afforded protection.

2. Mr. Nixon's right to privacy does not entitle him to an injunction, but the Court has the power to protect his rights and those of the government by fashioning a remedy.

*H. Remedy*

The Court will require the following procedure with regard to effectuation of the November 9th Agreement, with regard to any requests for Presidential materials and tape recordings made pursuant to court order or subpoena, or with regard to any request made under the Freedom of Information Act:

1. *Documents*: The government defendants, or their agents, prior to any governmental examination of the materials, shall permit Mr. Nixon or his counsel, (a) to segregate from any box or file, any document which is deemed personal, as defined by this Court; (b) to mark those portions of any document which are deemed private, as defined by this Court, without destroying or impairing the integrity of that portion or any other portion of the document;

2. *Tapes*: The government defendants or their agents, prior to any governmental examination of the tape-recorded conversations, shall permit Mr. Nixon or his counsel to listen to those tape-recorded conversations and, if any such tape-recorded conversation contains matters which are deemed private, as defined by this Court, then Mr. Nixon or his counsel shall so designate.

This procedure is to be effectuated as follows:

(a) The defendants shall specify one individual official of the government having expertise in the use of tape recording mechanisms (hereinafter, "operator") who at all times shall operate the mechanisms chosen by the operator for use in the procedure; and

(b) The operator shall employ two tape recorders, one (hereinafter, "recorder A") of which shall include the following features: (1) a single-listening device, commonly known as head-phones, and (2) a digital "counter"; the other (hereinafter, "recorder B") shall include the capacity to duplicate the recording from recorder A; and

(c) When Mr. Nixon, or his counsel, are in the process of listening to the tapes, he shall utilize the single-listener device; and

(d) The operator shall play the tape on Recorder A and duplicate the tape onto Recorder B, and when Mr. Nixon or his counsel deem any conversation or portion thereof as private, as defined by this Court, the operator shall stop recorder B at the commencement of that conversation or portion thereof so as not to record that conversation or portion thereof on the tape on recorder B at the termination of the conversation [or] portion thereof designated as private, and the operator shall also, utilizing the "counter," mark in a log

the digital number of the commencement and termination of the conversation or portion thereof designated as private. When a dispute arises with respect to the validity of a claim that a particular item, or portion thereof, is private, upon notice of counsel, the Court shall examine the material or tape-recorded conversation, or portion thereof, in camera. This shall be followed by a hearing under the procedure set forth in the Opinion.

The burden of proof as to whether a particular paper or tape-recorded conversation, or portion thereof, is personal, shall be borne by Mr. Nixon.

Following the release of Judge Richey's opinion, Mr. Nixon sought reconsideration of the Appeals Court's earlier refusal of a writ of *mandamus* in *Nixon v. Richey*.

The Appeals Court, in an opinion and order of February 14, 1975, continued its stay of January 31 of any order implementing Judge Richey's opinion. The court noted that since a three-judge panel was convened on February 5, 1975, to consider whether it properly should pass on the constitutional issue, no further action by the Appeals Court was needed in that regard.

The Appeals Court noted that in its opinion of January 31, 1975, it took pains to alert Judge Richey to the peril of disposing of the consolidated cases before acting on Mr. Nixon's application for a three-judge panel. The court said it was obviously referring to the doctrine of collateral estoppel. [Under the doctrine, a final judgment in a prior suit precludes relitigation of material issues decided in that suit.] The court continued that Mr. Nixon might be barred "from urging in the challenge case [*Nixon v. Administrator of General Services*, Civil Action No. 74-1852 (D.D.C.)] positions contrary to determinations which any decision of the consolidated cases might yield." [*Nixon v. Richey*, 513 F.2d 430, 438 (D.C. Cir. 1975).]

The Appeals Court proceeded to undertake a review of the history of the Act.

The court stated that there were two goals Congress intended to accomplish and did accomplish by the passage of the Act: (1) insuring the Federal Government's interest in acquiring control over and power to protect the Presidential materials; and (2) speedy determination of possible constitutional challenges to the validity of the Act.

The court noted that the three-judge requirement under procedures delineated in Section 2284 of Title 28 of the United States Code was eliminated in conference and the measure, with Section 105(a) of the Act, in its present form, which enables a single judge of the U.S. District Court for the District of Columbia to hear any constitutional challenge to this Act, was approved by the conference committee, and subsequently enacted into law.

The Act did not, however, prohibit the petitioner from making an independent application under Section 2284. The Court said:

The remarks of Representative Brademas demonstrate that Congress intended to preserve single-judge jurisdiction over the consolidated cases, even for consideration and decision of challenges to the constitutional validity of

the new Act in the event that such challenges were asserted in those cases. The remarks plainly contemplated, too, that any such challenge would utilize that opportunity. But Representative Brademas was completely silent on the question whether such a challenge could only take that route, and so is the rest of the legislative history.

We need not ponder whether Congress could validly have imposed the requirement that such a challenge could only be entertained in the consolidated cases. Nowhere in the legislative history is there any suggestion that Sections 2282 and 2284 would not enable a separate suit presenting a constitutional challenge to the Act in the context of a demand for injunctive relief. It would have been simple for Representative Brademas to state, and indeed for Congress to require, that those sections would not apply to challenges to the Act, had that been what Congress had in mind. Neither, however, was done, and the courts are left with the problem of determining whether petitioner's separate-suit challenge requires the usual three-judge court, particularly in light of the general canon of construction that repeal of a statute by implication is disfavored.

It is much the clearer, however, that Congress deemed indispensable to its objectives the immediate consideration and resolution of any challenge to the constitutional or legal validity of any provision of the new Act. It was to mandate that degree of expedition that each of the bills initially passing the Senate and the House contained the requirement that such challenges be heard and determined by a three-judge court with direct appeal to the Supreme Court, and contained also the requirement that both courts proceed immediately to consider and resolve the challenges.

\* \* \* \* \*

But what Congress expected, and what Section 105(a) as enacted would permit, was that any and all challenges to the validity of the Act would be made in the consolidated cases before Judge Richey as a single judge, after appropriate amendments and additions of parties for that purpose were accomplished. What Congress apparently did not anticipate was that petitioner, instead of pursuing that route, would institute a new, separate suit grounded on Sections 2282 and 2284 to test in orthodox fashion the constitutionality of the Act before a three judge rather than a single-judge tribunal. [513 F.2d at 422-443.]

The court added that what Congress wanted "was speed in judicial handling of such [constitutional] 'challenges' whether properly to be considered and determined by three judges or one. Just as plainly, the text and history of Section 105(a) indicate that Congress did not share the same concern for speed in the resolution of litigation not amounting to be a [constitutional] 'challenge'. That litigation is relegated to a position below the priority specified for 'challenge' actions." [513 F.2d at 444-445.]



The court concluded by granting Mr. Nixon's petition for *mandamus* and ordering a stay of the issuance of Judge Richey's order and of any further proceedings in the consolidated cases.

On April 2, 1975, Judge Richey removed himself from the consolidated cases in which he was trial judge and from the challenge case before the three-judge panel of which he was a member. He was replaced in both proceedings by Judge Aubrey E. Robinson.

In August of 1975, Rose Mary Woods, who was Mr. Nixon's personal secretary when he was President, moved to intervene in the action before the Court of Appeals for the purpose of having the stay over the proceedings in the consolidated cases amended to allow her to intervene in those proceedings. On September 2, 1975, the Court of Appeals allowed her intervention and granted her motion to amend its order of January 31, 1975. Miss Woods was then admitted in the consolidated cases as an intervenor plaintiff seeking to obtain certain personal papers of her own from the Administrator of GSA. On December 2, 1975, her motion for judgment on the pleadings was granted. The decision was immediately appealed to the Court of Appeals. [*Nixon v. Sampson*, Civil Action No. 75-2194 (D.C. Cir.).]

In the meantime, the three-judge panel in the challenge case heard oral argument on September 22, 1975. In a unanimous opinion released on January 7, 1976, the three-judge court upheld the constitutionality of the act on its face. [*Nixon v. Administrator of General Services*, 408 F. Supp. 321 (D.D.C. 1976).] A summary of the court's opinion appears as follows:

### *Scope of Inquiry*

The court, responding to its duty to avoid constitutional questions whenever possible, considers only those questions of the Act's constitutional validity that are immediately ripe for resolution. As no regulations have yet taken effect, and as such regulations once effective are explicitly made subject to judicial review, the court considers only the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and their screening by government archivists. \* \* \*

### *Claims Relating to the Separation of Powers*

The court finds nothing in the separation of powers doctrine to support the contention that the legislature may not pass a statute in any way touching upon the prerogatives of the Executive. The only genuine separation of powers claim is that the Act might invade the presidential privilege that attaches to the small fraction of the materials that genuinely implicate presidential confidentiality. Although the court thinks it doubtful that a former President, rather than the incumbent, may assert such privilege, at the very least such a claim is entitled to relatively less weight in the balance of competing considerations. And the infringement upon presidential confidentiality

caused by screening by trained and discreet government archivists, who have been employed to perform identical tasks for the materials of every President since Herbert Hoover, is very slight. The court finds, on the other hand, that Congress had ample reason to mandate screening by government archivists rather than control by Mr. Nixon, who lacks their expertise and disinterestedness. The two most important of the interests served by preservation and responsible treatment of presidential materials are (1) maintaining a complete and accurate historical record and (2) assuring the availability of the materials potentially needed for continuity in executive policymaking. Other interests served by the Act include informing the public about the Watergate matters and ensuring the availability of materials that may be relevant to legislative investigations or judicial proceedings. Because of the manner in which personal materials are intermingled with official ones, comprehensive screening represents the only feasible manner of protecting these important interests. The court finds that the slight inroad on presidential confidentiality caused by such screening is outweighed by the need to further these important legislative objectives. \* \* \*

### *Claims Relating to Privacy*

It appears from the record that plaintiff can validly claim a privacy interest in only a small fraction of the materials. Yet due to the historical practice of de facto control by Presidents of presidential materials, the court finds that regardless of where ownership of the materials lies—a question that need not be reached—plaintiff has a reasonable expectation of privacy in these materials, an interest that is infringed even by mere screening by government archivists conducted under legislation with retroactive application. In light of the intermingled nature of the materials, the court finds such infringement of privacy interests to be an inescapable concomitant of any attempt to serve the important legislative objectives underlying the Act. The private materials are far outnumbered by those that are non-private and related to those objectives. The court further finds that any invasion of privacy caused merely by archival processing—rather than by public access, which need not yet be considered—is not wide-ranging. In addition, less justification is needed when, as may be the case here, any invasion of privacy constituting a search and seizure does not serve law enforcement objectives. In light of these factors and the unavailability of less intrusive means of furthering the important legislative ends, the court concludes that any intrusion upon plaintiff's privacy interests has adequate justification. \* \* \*

*Freedom of Speech and Association*

Plaintiff's First Amendment claim is predicated upon the assumption that all materials—including those implicating privacy in political association—will be open to public access. The court finds no basis for that assumption. Rather, reaching only that infringement of First Amendment interests caused by screening by government archivists, the court finds any injury to protected interests arising from a confidential review process to be insubstantial. \* \* \*

*Equal Protection*

The court finds that any difference in treatment between plaintiff and other Presidents is adequately justified. As respects immediate past Presidents, their papers had already been deposited in presidential libraries where, on the whole, their availability to promote important governmental interests was assured. As respects current and future Presidents, legislating with respect to them risked disrupting current executive policymaking, and would be unwise before the Commission study of the sensitive and complex problems involved in regulating the records of federal officials had been completed. Only plaintiff has finished his service as President but has not yet established a presidential library. Prompt congressional action was reasonably deemed necessary to assure that the materials would remain preserved, and to begin the lengthy process of reviewing and classifying them. Finally, Congress could legitimately consider plaintiff to be less likely than his immediate predecessors or successors to dispose of the materials responsibly. \* \* \*

*Bill of Pains and Penalties*

There is, in the court's view, no evidence in the legislative record to support the claim that the Act was designed to impose, or constitutes, punishment within the meaning of the Bill of Attainder Clause. The court finds there are other legislative objectives served by the Act which Congress could legitimately—and did—consider. Rather than possessing traditional indicia of a punitive enactment, the Act includes provisions that indicate a concern for plaintiff's interests, provisions that are wholly inconsistent with the hypothesis of punitive intent. \* \* \*

The court ordered that the preliminary and permanent injunctive relief sought by Mr. Nixon be denied, and his complaint be dismissed as without merit. Pending the final disposition of any appeal of the decision, the defendants were enjoined from "processing, disclosing, inspecting, transferring, or otherwise disposing of any materials be they documents, papers, tape recordings or other items" which might fall under the provisions of the Act except for

legal proceedings, inspection by Mr. Nixon or his designated agent, or use for current business by the executive branch.

The court also noted that the Court of Appeals had stated in *Nixon v. Richey*, 513 F.2d at 448, that it would dissolve its stay of January 31, 1975, in the consolidated case proceedings, whenever the three-judge court indicated it believed the need for the stay no longer existed. "Having now entered judgment in this action, we are simultaneously requesting the Court of Appeals to dissolve the stay, thus permitting the consolidated cases to proceed in whatever manner seems fit in light of the possibility of appeals in this action \* \* \* . [513 F.2d at 333.]

The Court of Appeals removed the stay on the consolidated cases on February 5, 1976.

On March 25, 1976, the Court of Appeals refused to grant a summary affirmance of Judge Robinson's December 2, 1975 order in the consolidated cases which granted summary judgment to Rose Mary Woods on her motion seeking return of certain papers. Pending a decision on the merits of the appeal, the court ordered the parties to stipulate those materials as to which no controversy exists as to Miss Woods' ownership, and to make intermittent reports to the court. The parties have made several such reports to the court.

On March 5, 1976, Mr. Nixon filed with the Supreme Court a notice of appeal of the decision of the three-judge court. The case was argued before the Court on April 20, 1977.

On June 28, 1977, the Supreme Court affirmed the three-judge court's decision upholding the constitutionality of the Act. Noting that no effective regulations under the Act had yet been promulgated, and that after such regulations are promulgated they may be challenged under other provisions of the Act, the Court limited its considerations of the merits of Mr. Nixon's several constitutional claims to those addressing the facial validity of those provisions of the Act requiring the Administrator of GSA to take custody of the materials and subject them to screening by Government archivists.

Mr. Nixon had made the same constitutional arguments against the facial validity of the Act in the Supreme Court as he had made in the three-judge court. Writing for the Court, Justice Brennan reached the same conclusion as the three-judge court that each claim was without merit, although his analysis differed somewhat on some questions.

The court rejected Mr. Nixon's assertion that the Act violated the separation of powers doctrine in that it infringed upon the President's right to control the operations of his office, and pointed out that neither former President Ford nor President Carter had supported this claim, and that under the Act the materials would remain at all times within the executive branch. Furthermore, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the executive branch, such as the Freedom of Information Act, and such regulation of materials generated in the executive branch has never been deemed to be an invasion of its autonomy. As for Mr. Nixon's "more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny," the Court rejected



the view that only the incumbent President may exercise the privilege, adding:

[W]e think that the Solicitor General states the sounder view, and we adopt it:

“This Court held in *United States v. Nixon*, [418 U.S. 683 (1974)] that the privilege is necessary to provide the confidentiality required for the President’s conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President’s tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President’s tenure.” [Brief for Federal Appellees 33.] [Slip Opinion at 20–21.]

But, the court noted, again the fact that neither President Ford nor President Carter supported Mr. Nixon’s claims detracted from his contention that the Act impermissibly intruded into the executive function. Besides, said the Court, clearly Mr. Nixon may assert executive privilege only as to those items which fall within the scope of the privilege recognized in *United States v. Nixon*, 418 U.S. 683 (1974), and that means it would apply at most to only a small portion of the documents and recordings held in custody. In addition, the Court noted that all it need rule on at this time was to what extent an initial screening and cataloging by Government archivists would infringe upon the privilege, and that all Presidents since Herbert Hoover had put their papers into Presidential libraries where they were subject to eventual disclosure. The Court concluded that the screening process contemplated by the Act did not constitute a more severe intrusion of Presidential confidentiality than the in camera inspection approved in *United States v. Nixon*, and that if the guidelines adopted for review proved inadequate to safeguard Mr. Nixon’s rights or to prevent the usurpation of executive powers, they could later be challenged in a specific factual context.

As for Mr. Nixon’s claim that the Act violates his rights of expression and privacy under the First, Fourth, and Fifth Amendments, the Court found that:

appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant’s status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When

this is combined with the Act's sensitivity to appellant's legitimate privacy interests, see § 104(a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by "a host of persons," [Brief for Appellant 150], we are compelled to agree with the District Court that appellant's privacy claim is without merit. [Slip Opinion at 37-38.]

The Court also agreed with the three-judge court that Mr. Nixon had a legitimate First Amendment rights claim that disclosure of the contents of certain conversations might cause some individuals to refuse to associate with him and would prevent him from being able to take inconsistent positions in the future. However, the Court also agreed that there was no reason to believe that his right to remove some of the politically sensitive documents before screening would not be protected by the regulations which are to be adopted.

Finally the Court addressed Mr. Nixon's claim that the Act was an unconstitutional bill of attainder proscribed by Article I, Section 9 of the United States Constitution. In concluding that the Act was not a bill of attainder, the Court said:

Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which it finds burdensome may subjectively feel, and can complain, that it is being subjected to unwarranted punishment. *United States v. Lovett*, [328 U.S. 303, 324 (1946)] (Frankfurter, J., concurring). However, expansive is the prohibition against bills of attainder, it surely was not intended to serve as a variant of the Equal Protection Clause, invalidating every act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," *United States v. Brown*, [81 U.S. 436, 443 (1965)], it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Thus, in the present case, the Act's specificity—the fact that it refers to appellant by name—does not automatically offend the Bill of Attainder Clause. Indeed, viewed in context, the focus of the enactment can be fairly and rationally understood. It is true that Title I deals exclusively with appellant's papers. But Title II casts a wider net by

establishing a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials. In this light, congress' action to preserve only appellant's records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention. The Presidential papers of all former Presidents from Hoover to Johnson were already housed in functioning Presidential libraries. Congress had reason for concern solely with the preservation of appellant's materials, for he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by terms called for the destruction of certain of the materials. Indeed, as the Government argues, "appellant's depository agreement \* \* \* created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die." [Brief for Federal Appellee 41.] In short, appellant constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors. [Slip Opinion at 42-45. (footnote omitted).]

In addition, said the Court, this Act could not be a bill of attainder because, even if the specificity element were present, it lacked the forbidden legislative punishment aspect, which is something more than the possible burdensome consequences imposed by the Act upon Mr. Nixon.

Justice Stevens concurred in the opinion for the Court, but said the Act raised serious questions under the Bill of Attainder Clause. However, because Mr. Nixon resigned his office under unique circumstances and accepted a pardon for offenses committed in office. Justice Stevens stated that Mr. Nixon had put himself in a different class from all other Presidents and constituted a legitimate "class of one." Limiting himself to this case, and emphasizing that in his view this case is not a precedent for future legislation which is limited to one occupant rather than the Office of President, Justice Stevens voted to affirm the three-judge court's decision.

Justice White concurred in all of the opinion of the Court except that part dealing with the bill of attainder claim, and agreed in the result reached by the Court on that claim because he believed the Act is not a bill of attainder in that it does not prescribe any punishment. He also concluded that contrary to the court's decision, all purely private materials should be returned to Mr. Nixon immediately, even if they have historical significance, since he does not believe that the Government is entitled to Mr. Nixon's purely private communications merely because it wants to preserve them and offers compensation.

Justice Powell concurred in the judgment of the Court and in all parts of its opinion except those dealing with Mr. Nixon's claims relating to privacy and the Bill of Attainder Clause, because he was uncertain as to the reach of the discussion by the Court of the competing constitutional interests implicated by the Act. For rea-



sons different from the majority's he concluded that the Act is consistent on its face with the separation of powers doctrine. He first concluded that Congress had not acted beyond the scope of its constitutionally enumerated powers. This legislation serves the investigative and informative needs of Congress he said, and it did not assume executive branch functions. As to the argument that the Act impaired the Presidential privilege of receiving confidential communications, Justice Powell concluded that the fact that former President Ford, while he was in office, and now President Carter had both expressed the view that the Act furthered rather than hindered effective execution of the laws was dispositive of this issue.

Justice Blackmun concurred in the decision of the Court for the same reasons as Justice Powell, but did not join in Justice Powell's opinion because for Justice Blackmun the opinions of the incumbent Presidents were not dispositive. He agreed that their opinions were entitled to serious consideration, but pointed out that political realities and the often open hostilities between incoming and outgoing administrations can influence a President's opinions.

Chief Justice Burger dissented from the opinion and all conclusions of the Court. Title I of the Act violates the separation of powers doctrine in three ways, he said: first, Congress is compelling a President in the conduct of his office by forcing him to hand over his papers to the head of the GSA—a legislatively created agency; second, it is an attempt by Congress to use executive, not legislative powers, by gaining control of executive materials; and third, it makes a sweeping modification of the historical practice and constitutional privilege of confidentiality every President has enjoyed since 1789. Furthermore, the Chief Justice stated that he did not believe that the fact that the Act applies to only one President who has left office, justified what would otherwise be unconstitutional if it applied to an incumbent. In addition, Title I breaches the need for confidentiality of advice given to the President, said the Chief Justice, and he predicted that the Court's decision would force advisers to future Presidents to be circumspect in articulating their views to the President.

He also concluded that Title I intruded upon Mr. Nixon's right to privacy, violating the Fourth Amendment since it is a general warrant, and violating the First Amendment's freedom of speech and freedom of association provisions.

Finally, the Chief Justice stated that in his opinion the Act violates the Bill of Attainder Clause, as it meets both criteria of a bill of attainder by singling out an individual and by meting out punishment to him.

Justice Rehnquist also dissented, but since he believed the Act clearly violates the separation of powers doctrine, he limited his opinion to that issue. He concluded that the Act violated separation of powers in that (1) it hinders the communications a President will receive from advisers, foreign heads of state and ambassadors, Members of Congress, and others who deal with the White House, (2) it hinders the necessary flow of information to and from future Presidents, and (3) it intrudes upon the effective discharge by the President of his duties, which intrusion, when balanced



against the asserted interests of Congress fostered by the Act, cannot permit the Act to be sustained.

On August 15, 1977, defendants moved to dismiss the consolidated cases as moot, in view of the Supreme Court's decision in *Nixon v. Administrator of General Services*.

The consolidated cases were dismissed as moot by District Judge Robinson in an Order and accompanying Memorandum on September 21, 1977. The Memorandum stated that no further examination of the ownership of the Presidential materials was necessary since the holding of the Supreme Court in *Nixon v. Administrator of General Services* had resolved that question. Resolution of the issue of access to the Presidential materials under the Freedom of Information Act was also held to be inappropriate within the context of the consolidated cases since the Preservation Act establishes a comprehensive scheme governing all access to Presidential material.

Notices of appeal from the order dismissing the consolidated cases were filed on November 18, 1977 by plaintiffs' Reporters Committee for Freedom of the Press, *et al.*

On December 5, 1977, plaintiff-intervenor Woods moved the District Court to vacate the December 5, 1975 stay of its order of December 2, 1975 releasing to plaintiff-intervenor Woods her papers and materials within the custody of the Federal defendants.

The District Court denied the motion to vacate the stay on January 9, 1978.

The appeals of the District Court order dismissing the consolidated cases were consolidated by the Court of Appeals on January 16, 1978.

On March 22, 1978, the Court of Appeals reversed the District Court's holding that certain documents asserted by Miss Woods to be her personal papers should be turned over to her.

The Appeals Court determined that the criteria which had been used by archivists to determine that the documents sought by Miss Woods were her personal papers were not compatible with the purposes of the Presidential Recordings and Materials Preservation Act. The court concluded that:

Since an elaborate regulatory scheme has now been established by the Administration the most appropriate disposition of this case is to dismiss appellee's suit without prejudice, and to remand her to her administrative remedies. Should those remedies prove unavailing, she will be able at that time to seek judicial review under § 105(a) of the Act. [Slip Opinion at 14, this report at 256. (footnote omitted).]

*Status.*—The consolidated cases are pending before the U.S. Court of Appeals for the District of Columbia. The complete text of the decisions of the Court of Appeals and of Judge Richey are printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1975.

The complete text of the opinion of the three-judge District Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

The complete text of the Supreme Court's opinion is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

The complete text of Judge Robinson's memorandum of September 21, 1977, was printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

The complete text of the opinion of the Court of Appeals regarding the ownership of Miss Woods' materials is printed in the "Decisions" section of this report at 243.

**Nixon v. Solomon** (Newly Reported Case)

Civil Action No. 77-1395 (D.D.C.)

**Brief.**—This action was originally filed by former President Richard Nixon against Joel W. Solomon, as Administrator of General Services in U.S. District Court for the District of Columbia on August 10, 1977. The complaint sought declaratory and injunctive relief from certain provisions of the Regulations (41 C.F.R. § 105-63) promulgated by defendant pursuant to the Presidential Recordings and Materials Preservation Act (hereinafter "Act"), 44 U.S.C. § 2107 (1976) and from their enforcement by defendant. Nixon amended his complaint on August 19, 1977, in response to amendment of the regulations made on August 12, 1977 to challenge specifically sections 105-63.203, 105-63.204 (d) (e) (f) and (g), 105-63.302 and 105-73.303 of those regulations. The complaint was again amended on January 31, 1978.

In the second amended complaint, the first and second causes of action, out of a total of 19 causes of action, relate to the role of Congress in enacting Section 104(b) of the Act and in the promulgation of the regulations pursuant thereto. Mr. Nixon asserts, in the first cause of action, that Section 104(b) and all of the regulations promulgated pursuant thereto are unconstitutional, void, and violate his rights and privileges in that:

(a) Section 104(b) on its face violates the Separation of Powers doctrine embodied in Articles I, II and III of the United States Constitution by reserving to Congress the power to disapprove regulations promulgated to administer an act, which is an Executive function and not within Congress' power under Article I;

(b) Section 104(b) on its face constitutes an unlawful delegation of legislative power to one House of Congress;

(c) Section 104(b) on its face illegally permits Congress to evade the presidential veto requirements of Article I, § 7, clauses 1, 2 and 3 of the Constitution by taking actions having the effect of laws but without following lawful legislative procedures;

(d) Section 104(b) on its face violates Article I of the Constitution and the Separation of Powers doctrine by reserving to each House of Congress the power to change at any time the rules set by the Act under which proposed regulations may be disapproved, thereby permitting either House of Congress to accomplish an amendment of the Act without the signature of the President or a congressional override of a presidential veto; and

(e) Section 104(b) on its face purports to endow a House of Congress with powers outside those specifically enumerated in Article I of the Constitution or necessary and proper to such specifically enumerated powers. [*Nixon v. Solomon*, C.A. No. 77-1395 (D.D.C.), Second Amended Complaint For Declaratory and Injunctive Relief at 5-6.]

The second cause of action asserts that Section 104(b) of the Act is unconstitutional as applied in this case because Congress, under color of Section 104(b), improperly, unlawfully and unconstitutionally influenced the promulgation of regulations under the Act, in derogation of plaintiff's rights and privileges.

The Justice Department filed its answer on April 14, 1978. In regard to the first and second causes of action, the Justice Department "admitted" these paragraphs of the complaint "in that the fourth and now effective set of regulations are, in part or in whole, the product of the exercise of the Congressional one-House veto provided by Section 104(b) of the Act." [Answer at 2.]

The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenberg, Arthur Link, J. Anthony Lukas, Austin Ranney and Clement E. Vase moved to intervene as defendants on April 24, 1978.

*Status.*—The case is pending before the District Court.

### *Atkins v. United States*

No. 77-214 (U.S. Supreme Court)

*Brief.*—Plaintiffs in these cases are 140 judges of United States District Courts and United States Courts of Appeals. Filed in the United States Court of Claims on March 25, 1976, the complaint is based on Article III, Section 1 of the Constitution of the United States which states that "The Judges, both of the supreme and inferior Courts, shall \* \* \* receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

The complaint asserts that from March 15, 1969 to October 1, 1975, the nominal salaries of judges on both District and Circuit Court levels remained the same, but that their compensation was actually greatly diminished because of inflation; that in 1973, the Commission on Executive, Legislative, and Judicial Salaries (hereinafter "Commission"), pursuant to the Federal Salary Act of 1967 (2 U.S.C. § 351 *et seq.*), recommended to the President that judicial salaries be increased by 25 percent to offset the effects of inflation from 1969 to that time, but that then-President Nixon rejected that proposal and instead recommended increases of 7½ percent effective each March from 1974 to 1976; and that even these smaller increases were prevented from being implemented by a "one-House veto" by the Senate.

The plaintiffs allege as a first cause of action that Article III, Section 1 of the Constitution precludes the legislative and executive branches from reducing, either directly or indirectly, the real value of judicial salaries and obligates those branches of the Federal Government to take action to prevent diminution of judicial compensation resulting from inflation.



As a second cause of action, the complaint states that the Federal Salary Act of 1967 requires the President to submit to the Congress every fourth year proposals for salary adjustments for the Federal judiciary. President Nixon did this in 1974, and then, pursuant to 2 U.S.C. § 359(1)(B), the Senate passed Senate Resolution 293 on March 16, 1974, which vetoed the recommendations. The plaintiffs allege that this was an unlawful, unconstitutional, and void exercise by the legislative branch of Executive power reserved by Article II, Section 1 to the President, and that to give effect to this action would also violate Article I, Section 1, which states that the legislative power is vested in both Houses, and Article I, Section 7, which allows the President the opportunity to veto acts of Congress.

The plaintiff judges asked the court to "vitiate Congress's alleged disobedience to the Constitution by awarding them backpay in order to equalize the 'real dollar value' of their salary payments since 1969 as measured by the CPI [Consumer Price Index], with the level of compensation that Congress set for them in that year." [*Atkins v. United States*, 556 F.2d 1028, 1040 (Ct. Cl. 1977).]

During oral argument before the Court of Claims, Rex E. Lee, at that time Assistant Attorney General, Civil Division, Department of Justice, "admitted that 2 U.S.C. § 359(1)(B) is unconstitutional." [Brief Amicus Curiae on Behalf of Frank Thompson, Jr., Chairman, Committee on House Administration, United States House of Representatives, *Atkins v. United States*, Numbers 41-76, 132-76, 357-76 (Ct. Cl.), filed November 23, 1976.]

The clerk of the Court of Claims, in a letter dated October 14, 1976, notified the President of the Senate and the Speaker of the House of Representatives of the action of Mr. Lee and invited them to submit responses.

The Speaker of the House directed that a brief *amicus curiae* be filed on behalf of Representative Frank Thompson, the Chairman of the Committee on House Administration. This was done on November 23, 1976. In its introduction, the brief alleged that there had been no effort by counsel for the United States to preserve and defend the constitutionality of § 359(1)(B); that there was substantial question as to whether the Justice Department, acting in the name of the United States, could admit or concede that any law enacted by Congress and signed by the President was unconstitutional, especially where no express constitutional duty to see that the laws are faithfully executed, which duty runs to the executive departments, and which duty was breached in this case; and that the Department of Justice should have defended the validity of the statute or, if it was not going to do this, it should have notified Congress so that Congress might defend the statute. As constitutional arguments for upholding the validity of § 359(1)(B), the House argued that the Constitution commits to the Congress the exclusive power to ascertain judicial compensation and permits it to exercise this power by any means "necessary and proper"; that § 359(1)(B) of the Salary Act of 1967, being one of the means deemed "necessary and proper," is not prohibited by the separation of powers doctrine or any provision of the Constitution; that plaintiffs' second cause of action is nonjusticiable since it involves a political question; and that the pattern of cooperative accommoda-



tions between Congress and the Executive would be seriously jeopardized were the "one-House veto" to be declared constitutionally invalid.

As President of the Senate, then-Vice President Nelson A. Rockefeller also submitted a brief *amicus curiae* on November 22, 1976. In defense of the validity of the statute, the brief stated that the manner and means selected by Congress for determining judicial salaries is within its legislative powers; the statutory scheme they selected is consistent with the separation of powers doctrine; the effect of the actions by the Congress and the President was not to contravene the constitutional duties of either, but rather was to allow Congress to obtain information which prevents the President from raising salaries unilaterally and that on any law the President proposes, if one House doesn't sustain his proposal, it doesn't become law; that legislative disapproval does not constitute administration of a statute; and that if the one-House veto provisions of the Federal Salary Act of 1967 are held to be unconstitutional, the rest of the Act is also void, as these provisions are not severable.

On May 18, 1977, the Court of Claims issued its decision. The court first had to address the question of whether it was disqualified from hearing the case because of the Judicial Disqualification Act, 28 U.S.C. § 455 and the requirements of Canon 3C(1)(C) of the Code of Judicial Conduct of the American Bar Association adopted by the Judicial Conference of the United States. The court decided that the "rule of necessity", which states that a judge is not disqualified from trying a case even where he has a personal interest in the matter at issue if there is no other judge available to hear and decide the case, authorized and required them to hear the case.

The majority next turned to the question of whether the failure of Congress to raise Federal judicial salaries by more than 5 percent since 1969, in the face of severe economic inflation in the interim, violates Article III, Section 1, of the Constitution, and whether, as the plaintiffs asserted, the Compensation Clause not only protected them from substantial diminution of the purchasing power of their salaries, but is "self-executing" in so doing, *i.e.*, the clause itself creates a claim against the Treasury whether or not Congress had acted.

The executive branch had responded by asserting that the court lacked jurisdiction in this case "precisely because it [the Compensation Clause] is not self-executing, and in any event because it cannot be the basis for a claim for money beyond that authorized by statute at some point during a sitting judge tenure." [556 F.2d at 1043.]

This Government argument the court rejected noting:

If discriminatory treatment is aimed at the judiciary by the political branches to effect what is obviously an attack on the tenure or decisional freedom of the judges, it should not be assumed that Article III does not mandate the fashioning of whatever relief is necessary to alleviate the situation. [456 F.2d 1049.]

In addressing the guaranteed real income assertion made by the plaintiffs the court noted that earlier Supreme Court decisions had declared that:

Indirect, nondiscriminatory diminishment of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause \* \* \*. [556 F.2d at 1045.]

The majority noted however:

Plaintiffs, however, contend not only that their salaries have, by inflation and by congressional neglect of their plight and by congressional action on behalf of others, been diminished in a discriminatory fashion and to an extent that compromises the autonomy of their department, but also that the "compensation" which the Clause promises them will not be lowered is a compensation in real dollars, not nominal ones. They assert that inflation and congressional unwillingness to adjust their salaries to mitigate the effects of it have caused a decline in that supposedly guaranteed real income level, thus giving them a right to recover in this action. [556 F.2d at 1045.]

The plaintiffs first argued that the debates of the Constitutional Convention showed that the Framers intended to insure by the Compensation Clause not merely a fixed nominal salary but a guaranteed "real income" level. Following an analysis of the Convention debate the court declared:

It must be concluded then, that the Constitution in granting Congress the power and duty to fix judicial compensation and in not forbidding it to raise that compensation from time to time, left to the sound discretion of the political branches the adjustment of the judges' salaries as economic and other circumstances—inflation, higher living standards, need for better judges, more difficult cases, and greater caseload—required. [556 F.2d at 1048.]

As to the Government's assertion that the Compensation Clause is not "self-executing," the court noted:

By this is meant, defendant explains, that the Clause itself requires Congress to act in the first instance to set the judges' nominal dollar salaries, before the Clause's protection comes into play. If Congress does not alter the nominal dollar figures, reasons defendant, no help can be forthcoming from the Clause for plaintiff's benefit beyond that which they enjoy under the existing salary levels. [556 F.2d at 1049.]

To this the court replied:

The Clause's terms do not compel endorsement of defendant's restrictive view that the provision is not self-executing, and indeed its broad and benign purpose, fundamental to the constitutional system of checks and balances, leads to the contrary conclusion. Defendant's objection cannot stand to bar judicial relief pursuant to the Clause where a proper claim for relief is established. [556 F.2d at 1049.]

As to plaintiffs' argument that the court, as a matter of law, must allow judges greater compensation in order to attract individuals of high caliber to the Federal bench the court concluded:

Certainly, if less than adequate salaries could be set by Congress in the first place, the real value of which alone is protected from diminishment by the Clause, it is difficult to understand how one can find in the Clause a promise of compensation adequate to lead those high in professional standing to quit the practice of law in favor of judicial posts. In addition, deciding upon the level of salary "adequate" to attract "quality" personnel is somewhat problematic—it is first necessary to define "quality" and to determine what degree of it is sought after. The Constitution obviously gives no answer to this problem, nor does it instruct how much an otherwise adequate salary may properly be discounted to allow for the honor and public service "sacrifice" that historically have accompanied judicial office. We take notice of the fact, however, that the so-called "psychic income" some attribute to the prestige of a federal judgeship is not legal tender for the payment of bills judges incur just the same as do other citizens. Yet, these are matters for Congress to resolve, and no claim for relief here may be founded only on plaintiffs' equation of salary adequacy and personnel quality. [556 F.2d at 1050.]

The court proceeded to reject two other arguments offered by the plaintiffs in support of their claim that the Compensation Clause entitles them to a real dollar compensation increase absent an assertion of discriminatory attack. First, the court rejected the assertion that the term "compensation" as applied to remuneration for judges inherently implied the idea of payment in "real value" as opposed to payments in nominal amounts. Next, the court rejected the plaintiffs' assertion that absent some linkage of judicial salaries to an inflation index judges would be subjected to "feelings of dependence upon the legislature for the maintenance of their compensation." [556 F.2d at 1051.]

To this assertion the court replied:

The answer is that, while this may be true, no violation of the Constitution results. The Compensation Clause, though established in large part to guarantee the independence of the judicial department, permits and even contemplates a "feeling of dependence upon the legislature" to an extent. The Clause itself allows Congress to vary the nominal dollar value of judges' salaries by way of increase. [556 F.2d at 1051.]

The court concluded:

In sum, this court has no power to grant relief on plaintiffs' complaint that inflation without substantial pay increases has diminished the real value of their official salaries, for the Constitution affords no protection from such an indirect, nondiscriminatory lowering of judicial compensation, not involving an assault upon the independence of judges. [556 F.2d at 1051.]

The court also rejected the Government's argument that the claim for increased compensation required by inflation presents a political question and is therefore nonjusticiable. In support of this argument assertion the Government had asserted:

[A] decision in plaintiffs' favor on count I would (1) constitute a major incursion into the compensation-fixing responsibilities of the political branches, (2) involve the court in an area devoid of judicially discoverable and manageable standards for resolution, and (3) amount to the setting of judicial salaries by judges. [556 F.2d at 1052.]

Taking each point sequentially the court replied:

Defendant's first point, that a judgment giving plaintiffs compensation in excess of that set by statute would impermissibly intrude into the responsibilities of the President and Congress, seems based on the notion that the Constitution commits the fixing of judicial compensation only to the discretion of the political branches. It is true that the Compensation Clause envisages the participation of both the legislative and executive branches in setting judges' salaries. However, as should by now be plain, the Clause goes on to declare that those salaries, once set, "shall not be diminished" while the judges continue in office. How can it be said that the matter of judicial compensation is totally committed by the Clause to determination by Congress and the President, without opportunity for judicial intervention, when the Clause contains language that pointedly limits the kind of determination they may make? [556 F.2d at 1052.]

\* \* \* \* \*

Likewise, we cannot agree that plaintiffs' claim should be ruled nonjusticiable for want of judicially discoverable and manageable standards. The standards for determining the existence of a discriminatory attack on the judiciary can hardly be called difficult to discern or apply. The federal courts have amassed considerable experience in discrimination claims of many varieties under the fifth and 14th amendments. [556 F.2d at 1053.]

\* \* \* \* \*

The molding of relief may well present more of a problem. However, considering the imponderables involved in fashioning relief in such areas as reapportionment, school desegregation, antitrust, and Indian land rights, in all of which areas the courts have undertaken in the recent past to relieve violations of rights, the computation of a recovery for plaintiffs in the event they establish their discriminatory attack claim would be relatively simple. [556 F.2d at 1053.]

\* \* \* \* \*

The basis in the political question doctrine of defendant's third argument for nonjusticiability, that judges



would be engaged in the task of setting their own salaries, is difficult to perceive. In part this seems to recall defendant's original disqualification objection, disposed of in the discussion under part I of this opinion. To the extent it is an independent objection, it has already been answered in our treatment of defendant's first criticism, that a decision on count I would amount to an incursion into the responsibilities of the political branches. In disposing of a discriminatory attack claim in plaintiffs' favor, the court would ultimately undertake to adjust judicial salaries. However, the court would not be doing so in a vacuum; informing and guiding the relief settled upon would be not only the surrounding economic circumstances, judicially proved, but also the treatment accorded to other classes, not subject to discrimination, by the President and Congress. The initial policy determinations regarding the real compensation that judges should receive would always remain with the political branches. Defendant's third point, if it has any substance, fails to convince us that this case presents a nonjusticiable political question. [556 F.2d at 1053-1054.]

The court then considered whether the allegations made by the plaintiff showed a discriminatory attack upon the judiciary by the other two branches and if so whether such discrimination is redressable in the action before it.

On this point the court stated:

To make out a case, plaintiffs need not show a direct diminution of judicial compensation, but the indirect diminution that they complain of must be of a character discriminatory against judges and, paraphrasing Justice Holmes, must work in a manner to attack their independence as judges. Plaintiffs need to demonstrate the existence of a plan fashioned by the political branches, or at least of gross neglect on their part, ineluctably operating to punish the judges *qua* judges, or to drive them from office despite the Constitution's guarantee of tenure in office, "during good Behaviour." U.S. Const. art. III, § 1 (hereinafter Tenure Clause). Whether, to merit relief the discrimination must be intentional, or may be in effect only, we need not decide now. [556 F.2d at 1054.]

Noting the interrelationship between the Compensation Clause and the Tenure Clause, the court, citing Justice Story's commentaries on the Constitution, stated:

Without the one provision, he said, guaranteeing an undiminished compensation, "the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery." 2 STORY ON THE CONSTITUTION § 1628 (5th ed. 1891). The two clauses are inextricably tied to one another in pursuit of securing judicial independence, and to allow the indirect diminution of judges salaries to accomplish what the political branches are forbidden to do directly under the Tenure Clause would be to sanction a deplorable ruse at the expense of constitutional principle. If plaintiffs can demonstrate that the 7-year

freeze on federal judicial pay has brought about or imminently threatens to bring about the general demise of tenure in judicial office, for want of means on the part of judges to meet the cost of living, they will have gone far toward showing the compromise of the Tenure Clause's integrity in the very fashion that its twin, the Compensation Clause, was designed to prevent, and thus will have gone far to make their case of an assault on judicial independence by economic duress. [556 F.2d at 1055.]

The court noted that the plaintiffs could not show any such "mass exodus" of judges from the Federal bench.

As further evidence that no discriminatory attack against the judiciary was underway, the court pointed to the general salary freezes in the executive and legislative branches. In this regard the court noted a general antagonism in the public at large against salary increases for high Government officials as well as the judgment of Congress and the President through the Salary Commission that the salaries in the three branches of Government should be linked.

As a second count the plaintiffs had attacked the one-House veto as violative of:

1. Article I, Section 1 of the United States Constitution, which vests the legislative power in a "bicameral legislature" not in one House alone.

2. Article I, Section 7 which vests in the President veto power over every order, resolution or vote to which the concurrence of both the House and Senate is necessary.

3. Article II, Section 7 which vests all executive power in the President.

An analysis of the constitutionality of the one-House veto in the Salary Act, the court noted, calls for two fundamental inquiries:

1. Does it conflict with the constitutional powers and obligations of Congress as a whole acting through both Houses?

2. Does it invalidly intrude on the constitutional sphere of the President?

The answers to these questions, the court concluded, are dominated by several special factors:

1. The subject matter (official pay) is at the heart of Congress own competence and concern.

2. The fixing of pay scales may be delegated to the President.

3. In making the delegation Congress retained an interest in its own pay and the relationship of its pay to judges and other officials.

4. Although it wished to delegate authority, Congress wanted to retain "a large measure of control" over the pay levels to be set.

5. The President's salary proposals do not, even when they become law, regulate any person either actually or potentially. The recommendations do not affect the rights of others nor do they restrict any preexisting rights or privileges of anyone other than those whose pay is thereby established.

The court noted that the constitutional underpinning of 359(1)(B), the one-House veto device used here, is a combination of Article I, Section 1, which vests legislative power in the Congress, and Arti-

cle I, Section 8, clause 18, the so-called "Necessary and Proper" clause:

"Article I, Section 1, endows Congress with the broadest reach of power in this instance, so long as executive functions are not infringed and presidential veto rights not compromised, because the subject of the one-House veto, the salaries of judges and congressmen and other Government officers, is at the center of the congressional sphere. On this foundation, the necessary and proper clause authorizes Congress to choose, first, to delegate the initial power to make proposals to the President, and, then, to select for itself the appropriate method for checking and monitoring the President's action." [556 F.2d at 1061.]

\* \* \* \* \*

"Where there has been no violation of separation-of-powers principles or of any specific provision of the Constitution, the necessary and proper clause can authorize a given method of obtaining a desired result, as well as ground a substantive provision (as in *McCulloch*). We therefore see no reason why the one-House veto should fail of authorization unless one of plaintiffs' three criticisms of the device listed above establishes such a violation." [556 F.2d at 1061.]

The court noted that the allegation that the one-House veto violates the bicameral nature of the legislative process established by Article I, Section 1 was based on plaintiffs' syllogism:

1. Congress possesses only those powers delegated by the Constitution.
2. The Constitution delegates only legislative power to Congress.
3. All legislative power is delegated to both Houses, acting bicamerally.
4. The one-House veto is either a legislative act or it is not.
5. If it is not legislative it is beyond the power of Congress.
6. If it is legislative, Congress must follow the constitutionally prescribed legislative route which involved action by both Houses.

In considering the plaintiffs' arguments, the court concluded that it must initially determine whether either House may perform some actions without concurrence of the other body. If so, does the legislative veto provision involved in this case fall within that class of acts which may properly be carried out unilaterally?

First, the court declared that legislative action need not always be bicameral. The court noted that the purpose of Article I, Section 1 is to locate in the Congress rather than in the executive or the judiciary the central source of legislative authority. It declared that "the clause does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power." [556 F.2d at 1062.] The court added that while Article I, Section 1 requires Congress to confine itself to legislative matters, the clause does allow some measure of leeway for the manner in which Congress fulfills its legislative function.

Turning to the second element of this consideration the court decided that:

[T]he one-House veto here in controversy—being confined to the matter of salaries traditionally within the peculiar provenance of the legislative branch, not impinging upon Presidential functions or veto rights, and having no effect upon persons other than those whose salaries are at issue—does not fall within the class of acts that Congress must perform through the concurrence of both Houses, but rather is properly exercisable by a single House. [556 F.2d at 1063.]

The court noted that in this case the one-House veto did not make new law, but rather preserved the *status quo*:

[H]ad neither House approved a resolution withholding effectiveness from the new salary rates, they would indeed have become the law with the running of time, but it is essential to realize that they would have done so, and received the authority for their effectiveness, not in and of themselves, but solely through the mandate of the Salary Act, which was a statute enacted by both Houses of Congress and signed by the President. [556 F.2d at 1063.]

The Salary Act, by its own terms provided that the President's recommendations would become effective only "absent objection from either House of Congress." [556 F.2d at 1063.]

The court further noted that in this context, the one-House veto is not "a device employed for the circumvention of the Constitution's scheme for the enactment of statutes." [556 F.2d at 1065.] Nor does it expand or contract the powers of either House or of the Congress.

The second constitutional argument presented by the plaintiffs was that the one-House veto usurps the President's constitutional right to have sole veto power over the law. On this point the court concluded that the President's veto power related only to those legislative actions requiring the concurrence of both Houses and since the one-House veto was not such a legislative action, the language of the clause requiring that legislation be presented to the President is not applicable in this instance. The court noted:

"As for the policy of preserving the President's veto power vis-a-vis Congress, the problem handled by this particular Salary Act reflects perhaps the least need for such a veto with respect to rejection of Presidential pay recommendations." [556 F.2d at 1065.]

The court also noted that the President "is not forced to recommend any increase or decrease [in pay levels]; he can simply propose no change in the existing law. If he does that a statute will be necessary to modify the rates of pay (in the case of judges only to the extent constitutionally allowable). All in all, the possibility of undue legislative encroachment on the Executive—the focus of the Framers' stress on the veto power—is minimal in this situation." [556 F.2d at 1065.]

The third assault by the plaintiffs upon the constitutionality of the one-House veto is their assertion that it is violative of the "separation of powers" doctrine. The plaintiff's principle objections were:



1. The legislative power to adjust salaries, once delegated, becomes an Executive power. This argument the court rejected concluding that "when Congress delegates authority to the kind we have here to a member of the executive branch, the delegation does not convert the authority granted into irrevocable executive power, because in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the government." [556 F.2d at 1068.]

2. The legislative veto in the Act abrogates the President's constitutional duty to faithfully execute the laws. To this assertion the majority responded that "[i]n decrying the legislative veto as an abrogation of this constitutional 'power', plaintiffs propose an expansionist construction of this provision, conferring on the President implied powers which in some way are transgressed by the one-house veto in the Salary Act." On this point the court concluded: "Whatever power the President exercises under the Salary Act comes not from Article II, but from the delegation of Congress pursuant to the necessary and proper clause." [556 F.2d at 1068.]

3. "Congress can delegate power and can even delegate power with conditions, but it cannot affix an unconstitutional condition upon the delegation, i.e., review or veto by one House." [556 F.2d at 1065.] To this the majority replied: "The doctrine of unconstitutional condition is in no way pertinent to this case because as we have suggested repeatedly, the ultimate power with respect to judges' and others' salaries—and that is all that is involved here—is vested by the Constitution in Congress and not in the President." [556 F.2d at 1068.]

4. "The legislative veto involves Congress in day to day administration and hence expands the role of legislators into administrators in violation of Article I, Section 6, Clause 2." [556 F.2d at 1066.] That provision precludes a Member of Congress "during the time for which he was elected [from being] appointed to any civil office under the authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office."

This argument the court rejected stating that the weakness of plaintiff's "Office" argument is found in the reason for the adoption of Article I, Section 6. This provision was generated out of a fear that corruption would result if the legislature multiplied the number or increased the salaries of public officials for the benefit of its own members. The legislative veto creates no new offices for Members of Congress.

In pressing the argument on this point, the plaintiffs had in part relied on the Supreme Court's recent opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the validity of the Federal Election Campaign Act had been challenged. The Court declared: "plaintiffs reliance on *Buckley v. Valeo*, *supra*, is misplaced. There the Supreme Court held that because of the broad enforcement power given by the Congress to the Federal Election Commission, Congress was precluded from vesting in itself the appointment power over Commission members. The decision is based squarely on the appointment power being constitutionally lodged in the Executive

under Article II, Section 2, clause 2. Manifestly Congress has nowhere in the Salary Act attempted to exercise the power of appointment." [556 F.2d at 1070.]

In a separate opinion, Judge Nichols concurred in the reasoning and results of the court on the one-House veto issue, and concurred in the result reached by the court on the inflation and salary diminution claim, but for different reasons.

He first discussed the question of whether or not the court had jurisdiction to hear the case. He said that two barriers exist which the plaintiffs must surmount. The first is statutory—28 U.S.C. § 455, as amended (Supp. V., 1975), which requires the disqualification of judges in cases where their impartiality might be questioned. While Judge Nichols stated that anyone might reasonably question his impartiality, he concluded that the question of the disqualification of the judges on the Court of Claims could be waived and had been waived by the parties. If, he said, the Court of Claims did not have jurisdiction because of disqualification under 28 U.S.C. § 445, then the fact that no other court could entertain the case did not permit the Court of Claims to entertain it under the "doctrine of necessity" because the Court of Claims is a court of limited jurisdiction.

He declared:

To me it seems absurd for a court having such limited jurisdiction to invoke a "doctrine of necessity," saying we must override an unambiguous statutory bar because if we do not, the poor fellows have no remedy. If they have none, they only join a club that has many other members.

The "doctrine of necessity" to my mind exists only for courts of general jurisdiction and cannot be availed of to override unambiguous jurisdictional limits. [*Atkins v. United States*, (Nichols, J., concurring); 556 F.2d at 1072.]

Judge Nichols discerned a second jurisdictional barrier in the maxim that no one can sue for the salary of a position, except a salary fixed by law as the salary of the position that individual actually holds, or held until unlawfully removed. Applying this concept to the case before it, Judge Nichols declared that the Court of Claims did not have jurisdiction to decide the action. He also rejected the plaintiffs' contention that their Article III rights are self-executing.

Stating that he recognized that nothing in his concurring opinion could ever be quoted as "the law", Judge Nichols then discussed the merits of the inflation and salary diminution claim.

Congress may well have a duty to offset the effect of inflation on salaries, he reasoned, but just because there is a constitutional violation does not mean it is remediable in court. Congress may have a duty to remedy the constitutional violation itself or widen the jurisdiction of the courts so they may do it, but Congress can not be forced to do either. He believed that Article III was violated by Congressional inaction, even including the passage of the Federal Salary Act, and that some kind of damages, even if nominal should be available. However, since he was of the view that the court lacked jurisdiction he would never have reached the merits of this action.

Senior Judge Skelton, with whom Judges Kashiwa and Kunzig joined, wrote an opinion in which they concurred with the majority that the Constitution does not require the executive and legislative branches to take steps to offset the diminution in judicial salaries caused by inflation, but dissented from the majority's holding that the one-House veto is constitutional.

The minority opinion declared that the one-House veto violates (1) Article I, Section 1, which vests the legislative power of the United States in a Congress, and not in one House, (2) Article I, Section 7, clause 3, which reserves to the President the power to veto every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary, (3) Article II, Section 1, which vests all Executive power in the President, and (4) the separation of powers doctrine.

The opinion noted that the first law containing a one-House (or committee) veto was not enacted until 1939, and that every President since Herbert Hoover has been of the opinion that the one-House veto is unconstitutional, and each has been supported in this by his Attorney General. The minority also reviewed statements made by high ranking Government officials, who during their governmental careers had asserted the unconstitutionality of the one-House veto. In addition, the minority noted that:

It is very significant and most persuasive that the 140 able, experienced, and knowledgeable federal judges who filed these suits, together with their distinguished attorney former Supreme Court Justice Arthur Goldberg, all of whom are learned in constitutional law, believe the one-House veto is unconstitutional as shown by the allegations in their petitions and the arguments in their briefs. [556 F.2d at 1077.]

The three judges quoted from Judge MacKinnon's dissent in *Clark v. Valeo*, in which he concluded that the one-House veto is unconstitutional because, *inter alia*:

[it] makes it possible for a bare majority of a quorum (which frequently occurs) in either House of Congress to influence regulations constituting "rules of law," while completely depriving the President, possibly one-House of Congress, and one-third plus one of the members of each House, from exercising legislative power supposedly vested in them by the Constitution. Short reflection upon the enormity of these constitutional violations will convince anyone of the tremendous harm they cause to the basic procedures that the Constitution provides for the enactment of legislation to govern the Nation. [Emphasis in original] [Slip Opinion at 10.] [Quoted in *Atkins v. United States*; 556 F.2d at 1078.]

Judge MacKinnon's analysis is important, the minority added, because his is the only opinion written by an appellate judge which has considered the question of the constitutionality of the one-House veto in depth.

Furthermore, the minority was troubled by the fact that Clause B of the Salary Act allows one House to invalidate all or any part of the President's recommendations. They found that:



the vice of the one-House veto created by Clause B of the Act is compounded by the fact that in exercising such veto by a bare majority of a quorum of either House a small group of Senators or Representatives, or even a larger group, can do so selectively, that is, they can veto "all or part" of the salary adjustments made by the President and there is no recourse or appeal from their decision. In this manner they can dictate, change, or rewrite the salary adjustments made by the President. Not even the President has such an "item veto" nor the security that his veto will not be overridden. Such a system ignores and is contrary to the Constitution and the doctrine of Separation of Powers of our Government. [556 F.2d at 1078-1079.]

The minority also believed that greater weight should have been given to the fact that in arguing the Government's position, Assistant Attorney General Lee conceded at oral argument the unconstitutionality of a one-House veto, and had added that if this were a proper case, nothing would please him more than to have the court so rule. The minority concluded that since Mr. Lee was arguing for the Government, and since 28 U.S.C. § 516 reserves the conduct of this type of litigation to the Justice Department, the Government should be bound by this admission.

The minority then discussed the Salary Act itself. Congress has, the minority noted, the constitutional power to fix the salaries of Federal judges. This power can be delegated and was validly delegated to the President by the Salary Act. Once made, said these judges, the delegated power became Executive in character and remains such until both Houses pass legislation withdrawing it. No such legislative rescission occurred here. They also asserted that while the majority and the statute speak of the President's proposals as "recommendations," it is clear that the meaning and intent of the statute was to delegate to the President the power and authority to set judicial salaries, and not just make recommendations. This was shown by the fact that the President's proposals became law when the salaries set in 1967 and 1977 became effective without any Congressional action. Had they been merely "recommendations," said the minority, they could not have become law without the approval of both Houses of Congress. They further stated that:

Actually, these salary adjustments could be said to have the status of regulations issued by the heads of the various departments and other executive agencies of the government pursuant to statutes enacted by Congress. Such regulations have the force and effect of law without any action being taken regarding them by Congress. No one would contend that one House of the Congress could invalidate any of such regulation by a simple resolution. [556 F.2d at 1080.]

The minority further declared that since the one-House veto is legislative in character, it violates Article I, Section 1 of the Constitution which provides that all legislative power is vested in a Congress consisting of a Senate and a House of Representatives. The violation occurs because the House not exercising the veto



power is deprived of its authority to enact legislation. In addition, Article I, Section 7, clause 3, is violated in that the President is not given an opportunity to approve or veto the legislation. The minority reasoned that assuming *arguendo* that the one-House veto power is not legislative, it is clearly not judicial—but if it is Executive, then its use violates the Constitution, because neither House nor both Houses nor officials of either House can exercise Executive powers, and because Article II, Section 1 provides that all Executive power is vested in the President. In addition, the doctrine of separation of powers is violated.

Finally, the minority disputed the claims of the Congressional amici that this was a valid enactment under the “Necessary and Proper” clause. The minority declared:

The broad interpretation they give to this provision of the Constitution would authorize Congress to enact any and all kinds of legislation that suits its fancy so long as it does not conflict with an express provision of the Constitution. But as the plaintiffs point out, Congress can exclude aliens, but it could not admit aliens on condition that they agree not to exercise free speech. Further, Congress can confer jurisdiction upon the courts, but it cannot confer jurisdiction subject to the condition that judicial decisions must first be approved by the Senate Committee on the Judiciary. In other words, whether Congress can condition a delegation of authority depends upon the validity of that particular condition. This clause of the Constitution does not authorize Congress to ignore the bicameral provision of the Constitution, nor the necessity of submitting to the President every resolution to which the concurrence of both Houses are necessary, nor the provision that all executive authority is vested in the President. These provisions of the Constitution, in effect, prohibit the one-House veto, and the “reasonable and necessary” clause does not authorize Congress to ignore or transgress these fundamental provisions of our Constitution. No one can contend that the Constitution authorizes the one-House veto. A reasonable interpretation of its provisions points the other way. [556 F.2d at 1081-1082.]

Having determined that Clause B should have been held unconstitutional, the minority turned to the issue of severability. The test, as they enunciated it, was (1) are the valid provisions of the Act capable of standing alone, and (2) would the legislature have intended them to stand alone without the invalid provisions. Under this test, the minority concluded that Clause B is severable, and the remainder of the Act should continue in full force. They concluded that (1) the absence of a severability clause should not lead to a presumption of inseverability, (2) the legislative history showed that the one-House veto had little importance in the debate and Congress would have passed the Postal Revenue and Federal Salary Act of 1967 without the one-House veto provision, (3) removing Clause B would not end legislative control over judicial salaries because Congress can still pass legislation altering the President’s recommendations, and (4) Congress willingly delegated its authority in this area, as witnessed by the Federal Pay Comparability Act

of 1970, the Executive Salary Cost of Living Adjustment Act (which extended the provisions of the 1970 Act to judges, among others), and the 1977 pay raise under those acts. Finally, the minority viewed the way one-House veto bills have been treated as being dispositive of the severability issue. As noted earlier, each President since Hoover has stated his belief that the one-House veto is unconstitutional—yet many bills with one-House provisions have been enacted. The minority declared that a President obviously would not sign a bill which contained a provision he believed was unconstitutional if he did not believe that the unconstitutional provision was severable, since he would then in effect be signing into law a bill which would be unconstitutional. Noting that President Johnson believed the one-House veto was unconstitutional, the minority stated that he would only have signed the Federal Salary Act if he believed that the one-House provision was severable, thus allowing the rest of the Act to stand.

The minority next discussed the Government's contention that the Court of Claims lacked jurisdiction because the statute could not be interpreted as "mandating compensation by the Federal Government for the damages sustained." This argument was based on the claim that Clause B was not severable from the remainder of the act, and therefore, if Clause B is unconstitutional, the whole Act must fall. Since the minority found Clause B severable, they also found the assertion of lack of jurisdiction to be without merit. Furthermore, the minority rejected the Government's contention that no relief could be granted if a portion of the Act must first be declared unconstitutional.

Finally, the minority discussed the defendant's argument that if the court declared the one-House veto unconstitutional the decision should only be applied prospectively. The Government asserted first that Congressional reliance on Clause B should preclude the court from applying the unconstitutionality of the Act to the parties in the case. Congress had used Clause B in 1973 to override the President's pay recommendations. Had the Congress known that Clause B would be declared unconstitutional, they would have passed a statute pursuant to Clause A(1) said the Government. The minority rejected this argument, concluding that Congress would always act according to constitutional methods if the alternative presented is to place reliance on an unconstitutional method rather than on constitutional procedures. To accept defendant's argument would make prospective application the general rule when laws are declared unconstitutional. This would be improper, the minority noted because the Supreme Court has ruled that neither prospective nor retrospective application is automatic, but that each case must be looked at individually. Nor did the minority agree with the defendant that a decision of unconstitutionality should be applied only prospectively because otherwise it would be inequitable to Congress. On the contrary, they said, to apply it only prospectively would be inequitable to the plaintiffs who brought the suit, since it would deny them relief and discourage other plaintiffs from challenging the constitutionality of statutes.

As a second argument for prospectivity, the Government asserted that plaintiffs should not be allowed to attack the constitutionality of an act under which they have received benefits. The minority

said that in the cases the defendants cited as supporting this argument the plaintiffs in those actions had attacked the entire legislative scheme under which they had received benefits, whereas in the instant case plaintiff's attack only one provision which has not only not benefited them, but has denied them benefits.

The minority would have remanded the case to the trial judge to determine the amount due the plaintiffs, but would have denied them interest on their claims.

In addition to joining in Judge Skelton's opinion, Judge Kashiwa wrote an opinion concurring in part and dissenting in part. He said that when the President recommends salary increases there are 30 different possibilities in which a House may disapprove them either totally or partially. Of these, 28 are partial disapprovals which allow the other recommendations to become effective—and, argues Judge Kashiwa, these salary changes are changes in the law. Thus changes are made in the law by the action of only one House, clearly a violation of the Constitution. He submitted:

that since the provision is unconstitutional in 28 out of 30 instances (93 percent), the entire provision is unconstitutional in toto in that it has been held that where a portion of a statute is unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid on the basis of fortuitous circumstances only in a fraction of the cases it was originally designed to cover, the statute cannot be permitted to stand. [556 F. 2d at 1094.]

Judge Kashiwa noted the relationship between the salaries covered by the Salary Act in all three branches of Government, asserting that the one-House veto would be "obviously unconstitutional" if used as a partial veto in rejecting some salary proposals while allowing others to become effective. Therefore, he concluded, Congress would veto all raises, including those it actually believed to be justified, in order to block the raises it felt were not justified. He stated:

The practical effect of the unconstitutionality in the case of the 28 instances above mentioned is to defeat the purpose of the relationship clauses and to create a situation where deserving persons such as the plaintiffs in the present case will not be given raises which they deserve because a partial veto cannot be made even though the statute as Congress intended allows it. Because of the obvious unconstitutionality in the 28 out of 30 instances and its adverse practical effect and operation as above illustrated, it is my opinion that the single-house veto clause is unconstitutional in toto. [556 F. 2d at 1094.]

As for standing to challenge the partial vetoes, Judge Kashiwa said that the plaintiffs had standing because the Government, through Assistant Attorney General Lee, had stated that the one-House veto is unconstitutional, and thus it had waived its objections to plaintiffs' standing to challenge the 28 partial veto possibilities as well as the two total vetoes. He concluded that:

The loaf (§ 359(1)(B)) in this case is made up of 28 bad slices and of 2 slices which the majority claims are good



slices. But the two are so related to the 28 \* \* \* that I am of the opinion that the whole loaf of 30 slices is bad. [556 F. 2d at 1096.]

On August 8, 1977, plaintiffs filed a petition for writ of *certiorari* with the U.S. Supreme Court.

On November 2, 1977, the U.S. House of Representatives agreed to House Resolution 884 which authorized the chairman of the Committee on House Administration to intervene and appear as a party respondent in the case on behalf of the House of Representatives, "to defend therein the constitutional authority of Congress to make all laws as shall be necessary and proper for executing its constitutional powers." [H. Res. 884, 95th Congress.]

On December 9, 1977, U.S. Senators Jacob K. Javits and Edmund S. Muskie filed a brief *amicus curiae* in support of the petition for writ of *certiorari*. In their brief Senators Javits and Muskie indicated that their sole reason for supporting the petition was to permit the Court to decide the question of the constitutionality of the legislative veto.

**Status—The petition for writ of *certiorari* was denied by the U.S. Supreme Court on January 9, 1978.**

The complete text of the opinion of the Court of Claims is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

### ***McCorkle v. United States***

No. 77-486 (U.S. Supreme Court)

**Brief.**—On April 25, 1975, William McCorkle, Jr., a Federal employee, filed this action for damages and a declaratory judgment against the United States, the Chairman of the Civil Service Commission and the Director of the Office of Management and Budget.

In his two count complaint, Mr. McCorkle brought suit on behalf of himself and all U.S. Government employees whose salaries were frozen by operation of 2 U.S.C. § 359(1)(B) and 5 U.S.C. § 5308, the Federal Pay Comparability Act (hereinafter "FPCA").

In seeking to have the FPCA declared unconstitutional, Mr. McCorkle alleged that the Act's effect is to create an invidious discrimination between those Federal employees whose salaries have been frozen at a rate not to exceed the basic pay for Level V of the Executive Schedule and those Federal employees whose salaries have not been frozen. The discrimination claimed by Mr. McCorkle allegedly injures both the employees and the Government. He also asserts that § 5308 "is without any rational justification. Its effect is to cripple the effectiveness of the very group of employees which the FPCA was designed to benefit". [Complaint at 4.]

In his second count, Mr. McCorkle alleges that the procedure whereby pay levels for legislative, judicial and executive officials become effective is unconstitutional in that:

[T]he delegation of the power to veto the recommendation of the President to either House of Congress and the actual exercise of this power by the Senate is an unconstitutional delegation by Congress of the power to legislate violating the following provisions of the United States Con-



stitution: Article 1, Section 1, vesting all legislative powers in the Congress; Article 1, Section 7, clause 2 providing that bills which pass the House of Representatives and the Senate are to be signed or vetoed by the President and that the vote of two-thirds of the membership of both Houses is required for repassage over veto; and Article 1, Section 7, clause 3 providing for the same procedure as Article 1, Section 7, clause 2 regarding approval or veto of orders, resolutions, or votes. [Complaint at 6.]

On December 31, 1975, the United States filed a motion to dismiss stating:

Dismissal is sought on two grounds. First, it seems clear under sound constitutional principles that the plaintiffs cannot demonstrate a legally protectable property interest in salaries as Federal employees beyond the amounts they are currently being paid, and are thus without standing to invoke the due process guarantee of the Fifth Amendment. Secondly, it is the defendants' position that the plaintiffs' attack upon the constitutionality of the "one-house" veto provision of 2 U.S.C. § 359(1)(B) does not present a claim upon which this Court can premise meaningful relief, for we demonstrate that the Court, in the event the statutory mechanism for establishing the level of the salary ceiling were stricken, would be unable to judicially adjust that ceiling in plaintiff's favor. Accordingly, plaintiffs' claim in Count II is, in its constitutional posture, nonjusticiable, and alternatively inappropriate for the exercise of the Court's declaratory relief power. [Memorandum in Support of Motion to Dismiss, at 3.]

In a brief order filed March 17, 1976, the District Court granted the motion to dismiss holding that a "rational basis exists for the ceiling" on salaries under the General Services pay systems, and that setting salaries for Federal workers is an inappropriate area for judicial intervention, thus making the constitutional objections of the second count nonjusticiable. [*McCorkle v. United States*, Civil Action No. 75-317 (N.D. Va. Mar. 17, 1976).]

Plaintiffs filed a notice of appeal on April 30, 1976. The case was argued before the U.S. Court of Appeals for the Fourth Circuit on December 7, 1976.

On July 26, 1977, the Court of Appeals issued its decision.

As to McCorkle's first cause of action, that the salary schedules invidiously discriminate between employees of the Federal Government, the court concluded that the pay ceiling complained of "bears a reasonable relationship to Congress objective of balancing fiscal responsibility with employee needs. Since it justifiably furthers legitimate purposes identified by Congress, § 5308 does not deny McCorkle and his fellow employees equal protection of the law." [*McCorkle v. United States*, No. 76-1479 (4th Cir.); Slip Opinion at 7.]

The court next considered McCorkle's contention that the one-House veto of the President's recommendations for Executive schedule salaries as provided in the Federal Salary Act is unconstitutional. First, the court determined that Congress would not have

enacted the Federal Salary Act without the one-House veto provision, thus concluding that the President's power to fix salaries pursuant to the Act is not separable from the restriction on his power set out in the Act, the one-House veto.

The court determined that "[i]f the veto were unconstitutional, as McCorkle contends, the provisions for the President's recommendations to become effective could not stand in isolation. Accordingly, McCorkle would not be entitled to damages based on these recommendations." [Slip Opinion at 11; this report at 650.]

Noting that even if they were to declare the one-House veto unconstitutional Mr. McCorkle would be unable to recover damages and that while the appeal was pending a new pay statute had been passed eliminating the one-House veto provision, the court concluded that a declaratory judgment should be denied "because it would not serve a useful purpose in settling the controversy." [Slip Opinion at 12.]

On September 28, 1977, McCorkle filed a petition for writ of *certiorari* in the U.S. Supreme Court.

**Status.**—The petition for writ of *certiorari* was denied by the U.S. Supreme Court on January 9, 1978.

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

### ***Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.***

No. 76-3712 (Fifth Cir.)

**Brief.**—Federal Energy Administration (hereinafter "FEA") price control regulations set the maximum price of crude oil at \$5.40 per barrel. These regulations expired on August 31, 1975. In mid-August 1975, Citronelle-Mobile Gathering, Inc. (hereinafter "Citmoco") agreed to sell to Gulf Oil Corp. (hereinafter "Gulf"), and Gulf agreed to purchase crude oil at \$13 per barrel, the price to be effective from September 1, 1975, until such time as new valid price controls were imposed.

On September 29, 1975, President Gerald R. Ford signed into law the Emergency Petroleum Allocation Act of 1975 (hereinafter "1975 Act") which extended the Emergency Petroleum Allocation Act of 1973 (hereinafter "1973 Act") to November 15, 1975. Section 3 of the 1975 Act said that "It is the intent of the Congress that the regulations promulgated [by the FEA] under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act."

Between September 1, 1975 and December 14, 1975, Citmoco made six deliveries of crude oil to Gulf. Gulf paid \$13 per barrel for the first delivery, but only \$5.40 per barrel for the remaining deliveries. Citmoco filed suit on October 7, 1975, in the United States District Court for the Southern District of Alabama for the difference in the per barrel price of the oil delivered up to that time. On March 11, 1976, they amended their complaint to recover the difference for deliveries made from October 7, 1975 to December 14, 1975. Gulf filed a counterclaim on October 29, 1975, to recover the difference it had paid to Citmoco for the September 1, 1975 delivery for which Gulf had paid \$13 per barrel.

Citmoco asserts that there were no valid regulations regarding price controls in effect during the period of these deliveries, the 1973 Act having expired on August 31, 1975, and with it all of the FEA's regulations. They claim that the mere establishment of a new statutory expiration date for a lapsed Executive regulation was not sufficient in and of itself to revive the lapsed regulation, and that it also could not be given retroactive effect.

They also argue that the legislative veto provisions of the 1973 Act and the 1975 Act are unconstitutional. Section 4(g)(z) of the 1973 Act provided that the President, upon finding that there was no longer an emergency shortage of a product, could exempt that product from price controls for 90 days by submitting an amendment to the regulations to the Congress, but the amendment could not take effect until it had been before the Senate for 5 legislative days and the House of Representatives for 5 legislative days, and it would not take effect if either House passed a resolution disapproving the amendment. Citmoco asserts that these legislative veto provisions infringe upon the President's constitutional veto powers, contravene the specific constitutional provisions concerning the manner in which Congress can exercise its legislative powers, and are contrary to the constitutional doctrine of separation of powers.

The FEA was granted leave to intervene as a party defendant on March 10, 1976.

In an opinion and order filed on August 20, 1976, U.S. District Judge Virgil Pittman entered judgment for Gulf on the complaint and on its counterclaim for the difference it paid for the first delivery. The court found that Congress could and did extend the regulations and made them retroactive to August 31, 1975.

Regarding the issue of the legislative veto, the court said only:

The Government agrees with the contention that Section 5 is a Congressional veto of Presidential authority [which?] raises a substantial constitutional question but asserts that the plaintiff has no standing to raise this question. This court agrees. [*Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 420 F. Supp. 162, 170 (S.D. Ala. 1976).]

Citmoco appealed the decisions to the United States Court of Appeals for the Fifth Circuit on October 4, 1976. In its brief, Citmoco again asserted, *inter alia*, the unconstitutionality of the one-House legislative veto.

*Status.*—The case is pending before the United States Court of Appeals for the Fifth Circuit.

### ***Pressler v. Blumenthal* (formerly Simon)**

No. 77-450 (U.S. Supreme Court)

*Brief.*—On May 7, 1976, Representative Larry Pressler filed suit in the U.S. District Court for the District of Columbia challenging the constitutionality of "automatic annual" pay raises for Members of Congress. Congressman Pressler initiated the action in his capacity as a citizen, as a taxpayer and as a Member of Congress.

The complaint, accompanied by an application for a three-judge District Court, seeks a declaratory judgment that the Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act, which set forth procedures for establishing new rates of



compensation for Members of Congress, are unconstitutional. The complaint also seeks to enjoin executive officers, the Sergeant at Arms of the House, and the Secretary of the Senate "from requisitioning, authorizing payment of or disbursing increases in Congressional salaries effected pursuant to the [acts]." [Complaint at 6.]

The 1967 Act established a Commission on Executive, Legislative and Judicial Salaries which recommends to the President, at 4-year intervals, rates of pay for Senators, Representatives, Federal judges, cabinet officers, and certain other officials in the three branches of Government. Based on the Commission's recommendation, the President submits, in his next proposed budget, his own recommendations for governmental salaries. The President's recommendation becomes effective 30 days after his proposals have been transmitted to the Congress unless either at least one House passes a resolution disapproving of all or part of the recommendations, or until other rates are enacted.

Congressman Pressler contends that the procedure, insofar as it provides a mechanism for adjusting salaries of Members of Congress, violates Article I, Section 1 of the Constitution which provides that "[a]ll Legislative Power herein granted shall be vested in a Congress of the United States", and Article I, Section 6, clause 1, which provides "[t]he Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law and paid out of the Treasury of the United States." [Complaint at 8.]

Congressman Pressler further contends that the Executive Salary Cost-of-Living Adjustment Act of 1975, which provides for an automatic annual cost-of-living adjustment in the salaries of certain governmental officers, including Members of Congress, is unconstitutional. The Act states that the annual rate of pay for Members of Congress is to be the rate established pursuant to the provisions of the 1967 Act. Congressman Pressler asserts that insofar as the Act establishes procedures for the establishment of salaries for Members of Congress, it also violates Article I, Section 1, and Article I, Section 6, clause 1 of the Constitution.

Defendants argued that the complaint did not meet the "case or controversy" jurisdictional requirement of Article III of the Constitution for the reason that the issues presented raised a nonjusticiable "political question." Defendants also argued that Congressman Pressler did not have "standing," i.e., was not a proper party to raise these issues in that he failed to demonstrate any particular injury to himself that would qualify him to bring this action any more than any other citizen with a general interest in the subject matter.

On July 20, 1976, the District Court dismissed the complaint without prejudice for want of prosecution. On July 23, 1976, the court granted plaintiff's motion for reconsideration and vacated its order of July 20, 1976. On September 21, 1976, Representative James M. Jeffords was denied permission to intervene as a party plaintiff but was granted leave to file an *amicus* brief in support of Congressman Pressler's position.

Also on September 21, 1976, the issues were argued before the District Court on Congressman Pressler's motion for summary judgment, on defendant Simon's cross-motion for summary judgment, and on the defendants' motion to dismiss.



On October 12, 1976, the District Court handed down a memorandum opinion denying plaintiff's motion for summary judgment and dismissing the complaint. As to the challenge to Representative Pressler's standing, the court said:

A Congressman has standing to sue by reason of his office where Executive action has impaired the efficacy of his vote, *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974); cf. *Coleman v. Miller*, 307 U.S. 433 (1939), or certain other congressional duties. *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973). The resulting injury under such circumstances is said to create a personal stake in the outcome sufficient to assure that a suit by Congressmen affected would be in a proper adversary context. *Kennedy v. Sampson*, *supra*; see *Baker v. Carr*, 369 U.S. 186 (1962). Congressman Pressler alleges not that the efficacy of his legislative vote was impaired by the Executive, but rather that his vote was impaired by the failure of other Members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution. While it is clear that legislators have no special right to invoke court consideration of the validity of a statute passed over an objecting vote, *Korioth v. Briscoe*, 523 F.2d 1271 (5th Cir. 1975), where, as here, a Member of Congress alleges he is prevented from voting to perform a specific legislative duty expressly mandated by the Constitution, the suit may be cognizable by the courts so long as there is no attempt being made to interfere with the internal workings of the Congress.

Mr. Pressler's suit meets this requirement, but he must also show that he has been, or will be, injured before standing is recognized. *Warth v. Seldin*, 422 U.S. 490 (1975). Plaintiff's theory of injury is somewhat unclear, but sufficient facts have been alleged at this stage to support his claim of injury in fact. Under the Salary Act and the Adjustment Act the *status quo* as to congressional salaries may be altered without affirmative action by both Houses of Congress. While salaries may be changed in the traditional fashion, the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious.

In 1969, congressional salaries were raised by the new process for the first time. But Mr. Pressler was not yet a Member of Congress and cannot claim his vote was impaired. In 1975, a proposed salary increase was vetoed by a Senate Resolution. The *status quo* was unaltered and we can see no injury to Mr. Pressler, though he was then a Congressman. While the next Commission should report to the President shortly, any injury from this action is far too speculative to support standing.

However, in October 1975, congressional salaries, including Mr. Pressler's were raised under the Adjustment Act. This change was effected without action by the House and Senate. This circumvention of the traditional legislative process impaired the efficacy of Mr. Pressler's vote. He

has, therefore, standing to challenge the Adjustment Act. But that Act increases, on a percentage basis, the compensation as determined by Salary Act procedures. For this reason, Congressman Pressler has standing to challenge both pieces of legislation. Accordingly, standing will be afforded under the unique circumstances of this particular case. [*Pressler v. Simon*, 428 F. Supp. 302, 304-305 (D.D.C. 1976).]

As for the merits of Congressman Pressler's argument that the phrase "to be ascertained by law" constitutes an explicit mandatory requirement that whenever the compensation of Members of Congress is redetermined it must be fixed at that time by a law which is debated and passed like any other law, and that Congress cannot in effect delegate that responsibility, the court considered this argument to be directed at a matter of form rather than substance, and pointed out that initially Congress did legislate, Members of Congress do serve on the Commission which recommends pay levels, and the delegation of authority is hardly absolute, since Congress explicitly reserved the right to enact legislation regardless of any recommendation it may receive from the President.

The court observed that:

Congress continues to be responsible to the public for the level of pay its members received. There is no concealment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the executive and judicial branches was certainly not intended to be foreclosed by the ascertainment phrase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which plaintiffs seeks. [428 F. supp. at 306.]

The court concluded that:

The Salary Act and the Adjustment Act fix congressional compensation by law and these statutes are not prohibited by Article I, Section 6. Neither of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution. Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed. [428 F. Supp. at 306.]

On October 22, 1976, Congressman Pressler filed a notice of appeal to the United States Supreme Court.

In his jurisdictional statement, filed with the Supreme Court on January 20, 1977, Representative Pressler asserted that: (1) his interpretation of Article I, Section 6, is supported by prior decisions, the constitutional debates, and the conduct of early sessions of Congress; (2) the District Court had erred in its reasoning, in that: (a) it said that Congress had acted "by law" in passing the acts governing its compensation because it had set up a series of commissions, (b) it retained a veto power in each House, (c) it can

refuse to appropriate sufficient sums to fund the salary levels, and (d) because two of the nine members of the salary commission are appointed by the Speaker of the House and two are appointed by the President of the Senate; (3) his claim raises important questions of public policy; and (4) his claim will not subvert the methods of ascertaining non-Congressional salaries or result in any undue hardship to Members of Congress.

With the change in administrations, W. Michael Blumenthal was substituted as a defendant in his official capacity as Secretary of the Treasury in place of Mr. William Simon.

On April 1, 1977, Representative Jeffords and 18 other Members of the House of Representatives filed a motion for leave to file an *amicus curiae* brief in support of Representative Pressler's position. Mr. Blumenthal filed a motion to affirm on April 5, 1977.

The next day, the Secretary of the Senate and Sergeant at Arms of the House filed motions to dismiss or affirm. Each motion challenged Representative Pressler's standing and asserted that the issue presented is a nonjusticiable political question. They stated that the District Court's reasoning was correct; Representative Pressler's interpretation of Article I, Section 6, is not supported by prior decisions; the constitutional debates or the conduct of prior Congresses, and that his action could subvert the methods of ascertaining non-Congressional salaries even if only prospective relief is sought. Finally, both motions asserted that the one-House veto issue may have been mooted as to the Salary Act, since on April 4, 1977, both the Senate and House had adopted a conference report on a bill to extend the Emergency Unemployment Act of 1974 for an additional year and sent the bill to the President, and the bill contained an amendment requiring each House to conduct a separate recorded vote on the President's recommendations as to Congressional, judicial, and executive salaries within 60 days after they are received, and to thereby approve or disapprove the proposals.

In his reply brief, filed on April 15, 1977, Representative Pressler asserted, *inter alia*, that the case was not mooted because he sought to enjoin all pay raises which have occurred under the Salary Act, and the proposed amendment would not repeal the 1969 and 1977 salary adjustments which had occurred, nor did it affect the automatic cost-of-living adjustments made annually to Congressional salaries.

On May 16, 1977, the U.S. Supreme Court issued a brief *per curiam* decision. Noting that the amendment passed by Congress had been signed into law by President Carter on April 12, 1977, the Court said:

It appearing that the amendment to the Postal Revenue and Federal Salary Act will alter materially the scope and perhaps the nature of appellant's suit, the judgment of the District Court is vacated and the case is remanded to that court for further consideration in the light of the new legislation. [*Pressler v. Blumenthal*, — U.S. —, 52 L.Ed. 2d 216 (1977).]

The decision also said that Mr. Justice Stevens would have affirmed the lower court's decision dismissing the complaint.

On remand, an order was filed on July 19, 1977, reinstating the original memorandum and order of the District Court.



On September 21, 1977, Representative Pressler filed an appeal in the United States Supreme Court. In the jurisdictional statement filed with the appeal in the U.S. Supreme Court. He characterized the question presented in the following fashion:

Whether the methods of determining salary rates for Senators and Representatives under Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for Members of Congress without requiring a direct vote by either House of Congress. [Jurisdictional Statement at 4.]

Representative Pressler submitted that the question presented in the appeal is substantial and that the Court should note probable jurisdiction and decide the case only upon full briefing and oral argument.

On October 11, 1977 "We The People," which describes itself as a "non-partisan, public interest group", filed a brief *amicus curiae* urging the Court to grant a full hearing on the merits of the appeal.

On October 26, 1977, Representative James M. Jeffords and 18 other Members of the U.S. House of Representatives filed both a motion for leave to file a brief *amicus curiae* and the brief itself, in support of appellant.

Appellees Harding and Kimmitt filed motions to dismiss or affirm on November 16, 1977.

A motion to affirm was filed by the Secretary of the Treasury on December 14, 1977.

**Status.**—The Supreme Court affirmed the judgment of the District Court on January 16, 1978. The only opinion issued was a brief concurrence by Mr. Justice Rehnquist in which he stated that the affirmance did not necessarily reflect the Court's agreement with the District Court's conclusion on the merits of the Ascertainment Clause question, but could rest just as easily on a conclusion by the Justices that Representative Pressler lacked standing.

The concurring opinion of Mr. Justice Rehnquist is printed in the "Decisions" section of this report at 259.

The complete text of the original memorandum and order of the District Court is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

### **Edwards v. Carter**

No. 77-1471 (U.S. Supreme Court)

**Brief.**—On October 3, 1977, Mickey Edwards, Representative from Oklahoma and 50 other Congressmen filed a "Complaint for Declaratory Judgment" against President Carter. Plaintiffs seek a judgment declaring that submission of the Panama Canal Treaties to the Senate alone would divest the United States of property without the prior concurrence of the entire Congress, thereby precluding the Congressmen from exercising their official responsibilities as Members of the House. The complaint also asked the Court



to require that President Carter immediately send the treaties to the House for consideration. The plaintiffs also seek payment of costs incurred in the prosecution of the action.

The Congressmen base their complaint on Article IV, Section 3, clause 2 of the U.S. Constitution which reads as follows:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular States.

In support of their complaint, the plaintiffs note that under the Spooner Act, Public Law 183 of the 57th Congress, First Session, Congress authorized the acquisition of perpetual control of the land for the canal. Pursuant to that Act, President Theodore Roosevelt approved the Hay-Bunau-Varilla convention, under which, the complaint asserts the United States acquired in perpetuity the rights to the territory of the Canal Zone. The complaint also notes that since that time the Canal Zone has been administered at the President's direction in accordance with enabling legislation enacted at various times by Congress.

On November 11, 1977, plaintiffs moved to join nine additional Representatives as plaintiffs, which motion was granted on November 16, 1977.

On December 12, 1977, defendant filed a motion to dismiss.

District Court Judge Parker, in a memorandum opinion issued on February 20, 1978, granted defendant's motion to dismiss the complaint for lack of subject matter jurisdiction.

In his opinion, Judge Parker noted that, while there are no distinct standards for determining the Congressional standing question, a definite line has been drawn between legislators with and without a sufficient injury in fact. Citing *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) and *Coleman v. Miller*, 307 U.S. 433 (1939), the opinion stated that actual nullification of a Congressman's vote gives standing to the Congressman to challenge the action causing such nullification. On the other hand, standing has not been found where a legislator is not seeking viability for a specific vote already cast or a constitutionally prescribed follow-up vote. *Harrington v. Bush*, 533 F.2d 190 (D.C. Cir. 1977) and *Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. 1977).

Judge Parker noted that plaintiffs describe two classes of injury for which they seek redress, requiring separate discussion of each:

Their complaint alleges that the President's failure to submit the treaties to the House has infringed their "constitutional and legislative responsibilities to dispose of property belonging to the United States." This allegation appears to encompass not only the injury inherent in actual transfer of Canal Zone Property without House approval, but also the President's submission of the treaty property provisions to the Senate only. In the opposition to the motion to dismiss, they also assert a "constitutional interest in protecting the integrity of their

votes" on specific bills and resolutions now pending before the House, which concern substantive and procedural aspects of Panama Canal property disposition.<sup>5</sup> [Slip Opinion at 6; this report at 266-267.]

<sup>5</sup> Three bills (H.R. 9815, H.R. 8957, H.R. 8790) and eleven resolutions were all introduced in the 95th Congress, 1st Session. [Slip Opinion at 6; this report at 267.]

Turning first to the latter issue, the opinion cites *Metcalf (supra)* in support of the principle that, to create standing in a legislator, the injury and not merely the interest injured must be specific. In this connection the opinion stated:

However specific the bills and resolutions here, plaintiff Representatives are in no stronger a position for standing than were Senator Metcalf or Representative Harrington. President Carter has not frustrated or prevented them from voting. If the relevant bills and resolutions are snared in the legislative process, they have only their colleagues and themselves to blame. *See Reuss v. Balles*, 73 F.R.D. 90, 94-97 (D.D.C. 1976), appeal pending, No. 77-1012 (D.C. Cir.). The Court recognizes that plaintiffs might welcome a judicial declaration of the constitutional status of the defendant's actions before considering or voting on the legislation now pending. However, since a judicial decision concerning the bills and resolutions would not determine whether the territory is to be transferred or even whether the House merits a vote on the actual Panama Canal Treaties, such a decision would exceed the Court's Article III powers.

The Court also recognizes that a Senate vote on the treaties could undermine the effectiveness of a House vote on the now pending bills and resolutions. In response to this dilemma, however, the Court points out that it would be improper for the Federal judiciary to attempt to schedule the legislative process. Nor will the Court attempt to monitor the interrelationship of the House and Senate, particularly since the latter body is not a party to this litigation. [Slip Opinion at 7; this report at 267-268.]

Turning to the question of the right of the plaintiffs to cast an effective vote on the treaty provisions transferring American territorial control of the Canal Zone property, Judge Parker stated:

In essence, the House Members are asking the Court to interpret Article IV to mean that the House is entitled to vote on the same provisions concerning property disposition at the same time as the Senate. Such an interpretation would contradict the *Kennedy* standing requirement that a legislator must demonstrate interference with his official influence on the legislative process. Without attempting to usurp plaintiffs' legislative functions, the Court notes that they have been and are now free to introduce, consider and vote on legislation paralleling the Panama Canal Treaty, to determine if a majority of the House approves transfer of territorial sovereignty.<sup>7</sup> This

approach is admittedly more difficult than voting on provisions submitted by the President to the House. However, since the issue is whether the President has usurped plaintiffs' constitutional right to vote, the comparative facility of different methods of voting is not determinative. Just as in *Harrington* and *Metcalf*, the fact that legislators have been hampered in their legislative functions is not sufficient to show a nonspeculative concrete injury in fact.

<sup>7</sup> The Court is in no way implying that plaintiff would have standing if the House had passed a resolution on the proper procedural role of the House or on the merits of Canal Zone territorial sovereignty transfer. See the discussion of institutional and derivative standing in *Harrington* at 199 n. 41. [Slip Opinion at 8-9; this report at 269-270.]

Judge Parker specifically cautioned that he was not interpreting Article IV, where that Article allegedly conflicts with the President's treaty-making powers, is a nonjusticiable political question:

This is not to say that interpretation of Article IV, where that Article allegedly conflicts with the President's treaty-making power, is a nonjusticiable political question. Rather, considering that plaintiffs do have legislative avenues open to them in a situation rooted in international relations, the Court justifiably follows the precedent of *Public Citizen* [*Public Citizen v. Sampson*, 379 F. Supp. (D.D.C. 1974), *aff'd* without opinion, 515 F.2d 1018 (D.C. Cir. 1975)] to find that plaintiffs have not demonstrated concrete injury in fact. Nor is the Court saying plaintiffs are not entitled to a judicial remedy because they can pursue alternative legislative solutions. Instead, because their official powers as Representatives remain undiminished in substance, they have not suffered a particularized, nonspeculative injury in their capacity as legislators. *See Metcalf*, 553 F.2d at 189 and n. 129. [Slip Opinion at 10; this report at 270-271.]

By way of summary, the opinion stated:

The sixty House Members have not suffered a concrete nonspeculative injury in fact to their right to vote on the Panama Canal treaties. Possible legislative solutions are still available to them, both before and after any Senate ratification. They have not shown nullification of their official influence upon the legislative process. Further, the ultimate enactment of the territorial sovereignty provisions of the treaties is subject to many political contingencies, all unpredictable and uncontrollable by this Court. [Slip Opinion at 12; this report at 272-273.]

Plaintiffs appealed the decision of the District Court to the U.S. Court of Appeals for the District of Columbia Circuit on February 28, 1978, and filed a motion for injunction pending appeal.

A *per curiam* opinion of the Court of Appeals affirming the judgment of the District Court was released on April 6, 1978.

The opinion affirmed the dismissal of the complaint but for failure to state a claim on which relief may be granted, rather

than on the jurisdictional grounds that the Congressional plaintiffs lacked standing relied on by the District Court.

The reasons for deciding the case on the merits were stated in the opinion:

Deciding only the jurisdictional issue before us could result in this court, or the Supreme Court, remanding the case for further proceedings either on the merits or on jurisdictional issues. Because the merits of this controversy present a pure question of law, with no need of a hearing for fact development, because these merits are so clearly against the parties asserting jurisdiction, and because the judgment appealed from was based on only one of several asserted grounds of lack of jurisdiction, we believe it is appropriate to proceed directly to the merits of this case. This conclusion is bolstered when the time constraints imposed by the immediacy of Senate action on the treaties are considered. *See Adams v. Vance*, No. 77-1960 (D.C. Cir. Jan. 17, 1978), at 8 n.7 and cases cited therein.

Consequently, the precise question we address is whether the constitutional delegation found in Art. IV, § 3, cl. 2 is exclusive so as to prohibit the disposition of United States property by self-executing treaty—*i.e.*, a treaty enacted in accordance with Article II, § 2, cl. 2, which becomes effective without implementing legislation. [Slip Opinion at 4-5; this report at 282-283.]

The Court first construed the language of the property clause and concluded that it appeared on its face to be intended not to restrict the scope of the treaty clause, but rather to permit Congress to do legislatively what may concurrently be done through other constitutional means, to wit through the treaty power.

The debates over the treaty clause at the Constitutional Convention and State ratifying conventions were held to demonstrate directly the intent of the Framers to permit the disposition of United States property without approval by the House:

That those who framed and ratified the Constitution rejected several express attempts to limit the treaty power in the manner now urged by appellants greatly undermines the interpretation of that power they press upon us. From this evidence we conclude that the disposition of property pursuant to the treaty power and without the express approval of the House of Representatives was both contemplated and authorized by the makers of the Constitution. [Slip Opinion at 14; this report at 292.]

According to the opinion, no previously decided cases have addressed the precise issue of whether the property clause prohibits transfer of United States property to foreign nations through self-executing treaties. Nevertheless, the Court stated that the holdings and dicta in previous cases concerning the treaty and property clauses, while not dispositive, in the main support the conclusions of the Court.



The Court also declared that previous treaty practice supported its construction of the treaty and property clauses:

While certain earlier judicial interpretations of the interplay between the property clause and the treaty clause may be somewhat confused and less than dispositive of the precise issue before us, past treaty practice is thoroughly consistent with the revealed intention of the Framers of these clauses. In addition to the treaties with Indian tribes upheld in the cases discussed above, there are many other instances of self-executing treaties with foreign nations, including Panama, which cede land or other property assertedly owned by the United States.<sup>21</sup> That some transfers have been effected through a congressional enactment instead of, or in addition to, a treaty signed by the President and ratified by two-thirds of the Senate present lends no support to appellants' position in this case, because, as stated previously, self-executing treaties and congressional enactments are alternative, concurrent means provided in the Constitution for disposal of United States property.

<sup>21</sup> See, e.g., Florida Treaty with Spain of 1819, 8 Stat. 252 (256); Treaty Between the United States and Great Britain (Webster-Ashburton Treaty, 1842), 12 Bevans 82; Treaty between the United States and Japan (June 17, 1971), 23 U.S.T. 447, citations in note 22 *infra*. [Slip Opinion at 19; this report at 297.]

The decision of the Court of Appeals is characterized and summarized in its opinion in the following fashion:

It is important to the correct resolution of the legal issue now before us not to confuse what the Constitution permits with what it prohibits. In deciding that Article IV, § 3, clause 2 is not the exclusive method contemplated by the Constitution for disposing of federal property, we hold that the United States is not prohibited from employing an alternative means constitutionally authorized. Our judicial function in deciding this lawsuit is confined to assessing the merits of the claim of appellants that in the conduct of foreign relations in this matter, involving, *inter alia*, the transfer of property of the United States, the treaty power as contained in Article II, § 2, Clause 2, was not legally available. We hold, contrarily, that this choice of procedure was clearly consonant with the Constitution. [Slip Opinion at 21-22; this report at 299-300 (footnote omitted).]

On April 10, 1978, the appellants applied to the Chief Justice of the United States for an injunction pending review on *certiorari*. Mr. Chief Justice Burger denied the application on April 11, 1978 without prejudice to filing the same application with the Court of Appeals. Such application was made on the same day and denied by the Court of Appeals on the following day, April 12, 1978. Another application for injunction was made to the Supreme Court by appellants on April 13, 1978.

A petition for writ of *certiorari* was filed with the Supreme Court by appellants on April 15, 1978.

Petitioner's application for an injunction filed with Supreme Court on April 13, 1978 was denied on April 17, 1978.

On April 24, 1978, petitioners filed yet another application for an injunction with the U.S. Supreme Court.

The application for an injunction was referred to the Court by the Chief Justice and was again denied on May 1, 1978.

*Status.*—The petition for *certiorari* was denied on May 15, 1978. No further action has been taken.

The memorandum opinion of the District Court and the *per curiam* opinion of the Court of Appeals are printed in full in the "Decisions" section of this report at 261 and 277, respectively.

### *State of Idaho v. Vance*

No. 75 Original (United States Supreme Court)

*Brief.*—On October 13, 1977, the States of Idaho, Iowa, Louisiana, and Nebraska, represented by their Attorneys General filed a motion for leave to file with the United States Supreme Court a complaint in an original action in opposition to the proposed Panama Canal Treaties. Named as defendants were Secretary of State Vance and President Carter. On the same day the same States plaintiff, along with U.S. Senators Jesse A. Helms, James A. McClure, Strom Thurmond, and Orrin G. Hatch; U.S. Representative Daniel J. Flood; William R. Drummond, a United States citizen and a resident of the Canal Zone; and Theodore L. Sendak, Attorney General of the State of Indiana, filed the complaint, which seeks a judgment declaring:

1. The Canal, the rights to use of the Canal Zone and the improvements therein are properties of the United States;

2. The Congress has an exclusive constitutional authority to direct their disposition; or

3. In the event that the Executive possesses concurrent power under the treaty clause to dispose of such property, a further declaration that such authority may not be exercised (a) in contravention of existing legislation, or (b) so as to deprive citizens of their Constitutional and statutory recourse. [Complaint at 9.]

On September 3, 1977, plaintiffs applied for a preliminary injunction. The application was denied on September 6, 1977 by Justice Brennan and by Justice Rehnquist on September 7, 1977.

On December 23, 1977, defendants filed a brief in opposition to the motion for leave to file a bill of complaint. Plaintiffs filed a motion to strike the brief in opposition or in the alternative for allowance of time to respond on January 3, 1978.

That motion and the motion for leave to file a bill of complaint were denied on January 16, 1978.

*Status.*—No further action has been taken.

### *Curtis v. Carter*

A-539 (U.S. Supreme Court)

*Brief.*—On December 2, 1977, Senator Carl Curtis, Senator S. I. Hayakawa and Representatives Jack Kemp and Robert Dornan filed this action in the Federal District Court for the District of Columbia seeking to enjoin the President from turning over to the

present government of Hungary certain artifacts of historic significance to the people of Hungary. The complaint alleges that legal title to the artifacts, which includes the Crown of Saint Stephen (hereinafter "Crown"), is in the Government of the United States.

The plaintiffs assert that although the President has publicly stated his intention to return the Crown to the People's Republic of Hungary, such an action is beyond his authority. Their complaint asks for an injunction against any transfer of the Crown to the People's Republic of Hungary and for a declaratory judgment that pursuant to Article IV, Section 3, clause 2 of the Constitution, the Congress has the "sole right to dispose of and make all needful rules and regulations respecting the property of the United States." [Complaint at 5.]

On December 15, 1977, defendants moved to dismiss, or in the alternative for summary judgment.

On December 16, 1977, plaintiffs' motion for a preliminary injunction and for a stay of the District Court's order pending appeal were heard and denied. In the memorandum and order denying plaintiffs' motions, Judge June S. Green stated that plaintiffs had failed to meet the standards for issuance of a preliminary injunction as set forth in the controlling cases in the District of Columbia circuit. Judge Green also held that plaintiffs had failed to make a substantial showing of likelihood of success on the merits, noting that:

Plaintiffs' theories of United States ownership of the Hungarian Coronation Regalia, and in particular, their latest contention that it is captured property of a hostile state, have thus far not been convincing. Hence, the applicability of Article IV, Section 3, Clause 2 and Article II, Section 2 of the United States Constitution is highly questionable. In the absence of any property interest, the return of the Regalia presents a nonjusticiable political question involving the conduct of our foreign relations. The Constitution places these matters exclusively in the hands of the Executive Branch. [Slip Opinion at 2.]

The memorandum also expressed doubts as to the standing of plaintiffs to bring the action, and indicated that the harm to other parties and the public interest outweighed any injury to plaintiffs resulting from nonissuance of the injunction.

On December 16, 1977, plaintiffs filed a notice of appeal and moved the Court of Appeals for an injunction pending appeal.

On December 19, 1977, a *per curiam* order was filed in the Court of Appeals affirming the order of the District Court and ordering, *sua sponte*, that no action be taken by the executive department with respect to the Crown until noon, Wednesday, December 21, 1977, in order to afford the appellants the opportunity to apply to the Supreme Court of the United States for relief.

Plaintiffs applied to the United States Supreme Court for injunctive relief and the petition was denied December 21, 1977.

**Status.**—The application for injunctive relief was resubmitted and denied once again by Mr. Justice White on January 3, 1978.



The memorandum and order of the District Court is printed in full in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

**Dole v. Carter**

A-566 (U.S. Supreme Court)

**Brief.**—Robert Dole, a United States Senator from Kansas, filed this complaint for declaratory and injunctive relief in the United States District Court for the District of Kansas on December 23, 1977. The complaint named Jimmy Carter, President of the United States as defendant.

In his complaint, Senator Dole seeks, *inter alia*, a declaration of right declaring that the arrangement made by the President to return the Crown of Saint Stephen and associated regalia (hereinafter "Crown and regalia") to the Peoples Republic of Hungary is tantamount to a treaty or treaty modification requiring the Advice and Consent of the Senate pursuant to Article 2, Section 2, of the Constitution of the United States. Senator Dole also seeks preliminary and permanent injunctions restraining the President from delivering the Crown and regalia to the Peoples Republic of Hungary and an order of *mandamus* requiring defendant to seek the advice and consent of the Senate before delivering the Crown and regalia to the Peoples Republic of Hungary.

The motion for a temporary restraining order was denied on the same day. A hearing on the request for the preliminary injunction was set for January 3, 1978.

On December 29, 1977, defendant moved to dismiss the complaint, or in the alternative, for summary judgment. A hearing on that motion as well as on the motion for preliminary injunction was heard on the same day. On the following day, the motion for a preliminary injunction was denied, as was plaintiff's request for a stay of any order pending appeal.

In its memorandum and order denying the preliminary injunction the District Court described the factual foundation for Senator Dole's assertion that the custody of the Crown and regalia was in the United States pursuant to the 1974 Paris Peace Treaty thus:

The plaintiffs argument is premised upon his factual assertion that the subject of custody of the Holy Crown was by tacit agreement of the American and Hungarian authorities deliberately omitted from the text of the Paris Peace Treaty of February 10, 1947, in order to prevent the Soviet Union—a co-signer of the Treaty, then occupying Hungary—from asserting any claim of right to possession thereof. According to the plaintiff, the American and Hungarian authorities not only agreed that the Paris Peace Treaty would be silent on this subject; they also tacitly agreed that (1) the United States would retain custody of the coronation regalia until such time as Soviet troops were withdrawn from Hungary in accord with Article 22 of the Paris Peace Treaty; and (2) return of the regalia would be effectuated only after negotiation of an appropriate treaty between the United States and a legitimate Hungarian government at some future date. The plaintiff contends that this "silent agreement" is an integral part of



the Paris Peace Treaty of 1947 that cannot be varied or modified without the making of another formal treaty ratified by the Senate. In the alternative, he claims that any agreement to return the coronation regalia to Hungary in and of itself constitutes a new bilateral treaty for which the President must seek Senate approval. Therefore, the President's unilateral undertaking to return said regalia, evidenced by the December 13, 1977, exchange of letters, is said to be *ultra vires* and beyond the scope of his lawful constitutional authority. [Slip Opinion at 3-4.]

In denying the preliminary injunction, Judge O'Connor noted that there was no indication that either the Hungarian officials who approved the 1947 Paris Peace Treaty, or President Truman, or the United States Senators who voted in favor of ratification of the treaty were aware of any "silent agreement by tacit omission". Moreover, the contention that such a "silent agreement" could rise to the level of a formal treaty modifiable only by another formal treaty ratified by the Senate was rejected. Similarly rejected was plaintiff's contention that the agreement to return the Crown and regalia in and of itself constituted a new treaty which must be ratified by the Senate. In this connection the memorandum and order stated:

The President's agreement here involves no substantial ongoing commitment on the part of the United States, exposes the United States to no appreciable discernible risks, and contemplates American action of an extremely limited duration in time. The plaintiff presented no evidence that agreements of the kind in question here are traditionally concluded only by treaty, either as a matter of American custom or as a matter of international law. Indeed, while the court has not exhaustively examined all possibly pertinent treaties, the court can hardly imagine that any such examination would lend support to the plaintiff's position. Finally, the agreement here encompasses no substantial reciprocal commitments by the Hungarian government. As a matter of law, the court is therefore persuaded that the President's agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution. [Slip Opinion at 9-10.]

Senator Dole has demonstrated no reasonable probability of ultimate success on the merits of his claim, Judge O'Connor concluded, and therefore the application for preliminary injunction must be denied. It was emphasized that the decision was rendered solely on grounds of the preliminary injunction question and that plaintiff's standing to bring the action and the subject matter jurisdiction of the court were assumed, but not decided. Consideration of those latter questions, as well as consideration of defendant's motions to dismiss or, in the alternative, for summary judgment were held to be necessary only if the case proceeds beyond the preliminary injunction stage.

Senator Dole appealed the order of the District Court on the same day it was issued, December 30, 1977, and asked the Court of

Appeals for an injunction pending appeal and for expedited consideration of the appeal.

The appeal was argued on December 31, 1977, before a three-judge panel of the United States Court of Appeals for the Tenth Circuit. In a *per curiam* opinion issued on the same day, the motion for an injunction pending appeal was denied. In the opinion, the court stated that no justiciable controversy which would be within the court's jurisdiction under Article III, Section 2, clause 1 of the Constitution was presented by this action. Relying on the holding of the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186, the Court characterized the case at bar as a controversy not susceptible to judicial resolution. The Court also stated that no violation of the Paris Peace Treaty was shown by the record presented. The Court further stated that it assumed that the assurance of defense counsel that the Crown would be retained by the President until the motion for a preliminary injunction could be heard would extend to permit consideration by the Supreme Court, or a Justice thereof, of the order denying an injunction pending appeal.

**Status.**—Senator Dole applied to the U.S. Supreme Court for emergency relief. The application was denied by Mr. Justice White on January 3, 1978.

The complete texts of the decisions of the District Court and the Court of Appeals are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.



## V. OFFICERS, EMPLOYEES, AND AGENTS OF THE CONGRESS

### *Socialist Workers 1974 National Campaign Committee v. Henshaw* (formerly Jennings)

Civil Action No. 74-1338 (D.D.C.)

*Brief.*—On September 10, 1974, the Socialist Workers 1974 National Campaign Committee, other State and local Socialist Workers Party Organizations and individual members of the Socialist Workers Party filed suit in the U.S. District Court for the District of Columbia, asking the court to declare unconstitutional portions of the Federal Elections Campaign Act of 1971 (hereinafter "FECA").

Named as defendants in the case were the Clerk of the House, the Secretary of the Senate and the Comptroller General of the United States, each of whom is designated as a "supervisory officer" with whom statements and reports required under the FECA are to be filed.

The plaintiffs allege, *inter alia*, that the provisions of the FECA requiring the disclosure of the identities of party members, contributors, and others who support "lawful, though controversial political activities," deprive them of their freedom of association rights under the First Amendment. Plaintiffs also assert that the reporting and disclosure requirements "deprive the plaintiffs and their supporters of the right to associational privacy and to political anonymity under the First, Fourth, and Ninth Amendments to the Constitution. \* \* \*"

On October 2, 1974, Common Cause moved to intervene as a defendant. On October 10, 1974, the motion to intervene was granted and plaintiffs' motion for a three-judge Federal District Court to rule on the constitutionality of the law was denied. The denial was appealed, but on December 12, 1975, while the appeal was before the U.S. Court of Appeals for the District of Columbia Circuit, the District Court granted plaintiffs' motion for the three-judge court, so the appeal was dismissed.

Plaintiffs sent interrogatories to and requested the production of documents from: W. Pat Jennings and his successor Edmund L. Henshaw as Clerks of the House of Representatives; Francis R. Valeo as Secretary of the Senate; and Elmer B. Staats as Comptroller General of the United States. The House passed H. Res. 863 on November 13, 1975, authorizing the Clerk to answer the interrogatories and to provide copies of notifications of noncompliance or apparent violations sent by the Clerk to campaign organizations affiliated with the Socialist Workers Party from January 1, 1975, to the date of the resolution, if the court determined that such documents were material and relevant. The court so determined on November 19, 1975.

A second set of interrogatories and requests for the production of documents relating to the Socialist Workers Party was received by each of the defendants on March 8, 1976. The House passed H. Res.



1122 on March 31, 1976, which had provisions similar to those of H. Res. 863, allowing the Clerk to provide the court with copies of all "nonpublic" records or documents maintained by his office relating to plaintiffs or to any previous Socialist Workers Party committee, candidate or official which were requested in the subpoena *duces tecum* and were found by the court to be material and relevant.

On July 23, 1976, plaintiffs filed a first supplemental and amended complaint for declaratory relief, adding several State Socialist Workers Parties as plaintiffs and adding the Federal Election Commission (hereinafter "FEC") and Attorney General Edward Levi as defendants. The FEC was added because it is charged by the 1976 amendments (hereinafter "Amendments") to the FECA with monitoring and enforcing the recordkeeping and disclosure provisions of the FECA and the Amendments, and Attorney General Levi was added because he is charged with enforcing the FECA's criminal sanctions. The amended complaint states that under the Amendments the plaintiffs must maintain records of all contributors of \$100 or more and identify them to the FEC, and that plaintiffs have not identified them on unnamed constitutional grounds. It states that recent information concerning Government harassment and surveillance of persons associated with the Socialist Workers Party shows further proof that disclosure of these contributors would deter and intimidate persons from associating with, contributing to, and supporting the plaintiffs and their candidates. It asks the court to declare 2 U.S.C. §§ 432 (b), (c), and (d), and 438(a)(8) and 434(b)(1)-(8) unconstitutional on their face as applied to plaintiffs and to contributions and expenditures on behalf of their then-Presidential candidate Peter Camejo, and to preliminarily and permanently enjoin their enforcement as to plaintiffs and as to candidate Camejo.

On August 31, 1976, the Clerk of the House, the Secretary of the Senate, and the Comptroller General moved for dismissal. These defendants asserted that as a result of the FECA Amendments of 1974, the duties they originally had under the FECA had been transferred to the FEC which under the 1974 and 1976 Amendments has the responsibility to enforce and administer the disclosure provisions challenged by the plaintiffs.

On September 29, 1976, the FEC filed its motion to dismiss. In support of its motion the FEC noted that it, not the courts, has exclusive primary jurisdiction over enforcement of the FECA. Additionally, the FEC asserted that the issues raised by the plaintiffs' complaint are all within its exclusive primary jurisdiction, and that the court "should remit the plaintiffs to the processes established by law for enforcement of the statutes." [Points and Authorities in Support of Defendant Federal Election Commission's Motion to Dismiss the Action for Lack of Jurisdiction, at 9.]

On October 21, 1976, Attorney General Levi filed a motion to dismiss, asserting that the plaintiffs' amended complaint failed to set forth a justiciable case or controversy between the plaintiffs and the Attorney General. The Attorney General noted that the plaintiffs had failed to allege that the Attorney General had either enforced or threatened to enforce against them the criminal provisions of the FECA and its amendments. The Attorney General also asserted that the causes of action alleged by the plaintiffs were

directed at actions taken by officials other than the Attorney General.

On October 21, 1976 and November 4, 1976, Common Cause filed memoranda in opposition to the motions to dismiss made by the FEC and the Attorney General.

The court, on January 17, 1977, granted the motions to dismiss filed by the Clerk of the House, the Secretary of the Senate, the Comptroller General, and the Attorney General. As to the Federal Election Commission, the court denied its motion to dismiss. However, the action was remanded by the court to the FEC "to develop a full factual record and make specific findings of fact concerning the present nature and extent of any harassment suffered by plaintiffs as a result of the disclosure provisions, including 'economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.' " [Order, *Socialist Workers v. Jennings*, Civil Action No. 74-1338 (D.D.C. 1977); Slip Opinion at 3.] The FEC was given 6 months to complete the factual record and make findings of fact, which then are to be reported to the court.

Additionally, the court ordered that as to the defendants who had been dismissed, plaintiffs were to be allowed to pursue and complete discovery against those individuals as if they had remained parties to the action.

On March 15, 1977, plaintiffs filed a motion for clarification of the order of January 17, 1977, which motion was granted on April 19, 1977. In the order granting the motion for clarification, the court reaffirmed in all respects its order of January 17, 1977, and ordered that pursuant thereto, the defendant FEC is not authorized to proceed pursuant to 2 U.S.C. § 437(g) nor to make any representation or determination that the FEC has "reason to believe" that plaintiffs have violated the challenged provision of the FECA, as amended.

On May 19, 1977, defendants filed a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit.

On November 4, 1977, a Clerk's order was filed deferring, until a hearing on the merits, appellant's motion for a stay pending the outcome of the appeal.

The appeal was argued on December 6, 1977, and was dismissed on December 13, 1977, by a *per curiam* opinion of the Court of Appeals. In its opinion, the Appeals Court declared that the order of April 19, 1977 clarifying the order of January 18, 1977, was clearly not a preliminary injunction, in the context of the special circumstances and procedures of this particular suit, and therefore the court was without jurisdiction to review it. The court further noted that:

The District Court obviously was aware of the necessity in appropriate cases to provide anticipatory judicial relief against prosecutions threatening sensitive First Amendment Freedoms. The District Court's order of January 17th was in the nature of an instruction to a master to prepare a record and findings, which order is not appealable. *Teamsters Local Unions 745, etc. v. Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371, 1373 (5th Cir. 1970), cert. denied, 401 U.S. 937 (1971). We fail to see how a second order, clarifying which procedures the FEC should use, or not

use, in complying with the order to prepare a record, could be any more of an appealable injunctive restraint than the first order. [Slip Opinion at 3.] [Footnote omitted.]

On April 17, 1978, the F.E.C. filed its findings of facts pursuant to the January 17, 1977 order of the District Court.

*Status.*—The case is pending before the District Court.

The complete opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

The complete order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

### ***United States v. McPherson***

Civil Action No. 77-0510 (D.D.C.)

*Brief.*—This action was filed by the Justice Department on March 22, 1977, against Michael C. McPherson and his wife, Patricia Sanderson McPherson.

The complaint states that from January 3, 1969 to December 15, 1975, Mr. McPherson was the Administrative Assistant to Congressman William L. Clay and that in that capacity he was authorized to designate and supervise persons on Representative Clay's staff. Such staff members were paid by the House Finance Office, out of the House contingent fund, by checks drawn on the U.S. Treasury. During the times relevant to this action Mr. McPherson had designated to be placed on the payroll Mrs. McPherson's sister, Loretta V. Sanderson. (William McPherson and Patricia Sanderson were not married at the time Loretta Sanderson was placed on Representative Clay's payroll.) From December 1972 to October 1974, checks totaling approximately \$44,100, less deductions were made payable to Loretta V. Sanderson. The complaint asserts that during that time Loretta V. Sanderson did not work in the offices of Congressman Clay, but was a full-time school teacher, working and residing in Los Angeles, Calif. It also states that she did not receive or endorse the checks made out to her. Instead, they were deposited in accounts controlled by the defendants or otherwise negotiated (with the forged or purported signature of Loretta V. Sanderson) at defendants' direction, for their use and benefit.

The first cause of action brought under 28 U.S.C. § 1345, states that this money was paid to the defendants by plaintiff in the mistaken belief that it was disbursing salary checks to an eligible employee, and seeks approximately \$44,100 in damages. The second cause of action alleges that the defendants were unjustly enriched by Mr. McPherson's violations of the fiduciary duty he owed to the plaintiff, and asks \$44,100 less deductions, in damages. The third cause of action asserts that plaintiff did not receive the honest, full, faithful, and unencumbered services of its agent, Michael McPherson, who breached his fiduciary duty and violated the confidence, authority and public trust reposed in him by plaintiff. It asks the court to impose a constructive trust upon defendants' assets and property, or a trust *ex maleficio* upon all earnings, income, profits, and benefits of the alleged conduct, totaling \$44,100, and the proceeds, however held, concealed, or disbursed, all for the use and benefit of the plaintiff as beneficiary. The fourth cause of action is



brought under the False Claims Act (31 U.S.C. §§ 231-235). It asserts that the submission of the Payroll Authorization Form, designating Loretta V. Sanderson as a "clerk-hire," to the Finance Office was pursuant to a scheme to defraud the plaintiff, and that the defendants knew the vouchers submitted were false, fictitious or fraudulent, and that the defendants deposited in their own bank accounts or otherwise negotiated these checks with the forged or purported endorsement of Loretta V. Sanderson on them, thereby causing the submission of false claims upon or against the United States. It asks for double its damages of \$44,100 and for the statutory forfeiture of \$2,000 for each violation of the False Claims Act.

On June 28, 1977, the Government requested an entry of default against the McPhersons for their failure to appear, plead or otherwise defend the suit, the time for doing so having expired on April 25, 1977.

On the same day, the Clerk of the U.S. District Court for the District of Columbia signed a notice of default against the McPhersons.

On July 26, 1977, a judgment by default for the Government was entered by the court.

Defendants asked the District Court, on November 2, 1977, to set aside the default judgment.

The Government filed its opposition to the motion to set aside the default judgment on April 14, 1978.

A notice of partial satisfaction of the judgment was filed by the Government on May 5, 1978.

On May 9, 1978, a settlement agreement was filed with the court, and an order was issued approving the settlement agreement and dismissing with prejudice the defendant's motion to set aside the prior judgment.

*Status.*—No further action has been taken.

*Note:* This action arises out of the same set of facts as *United States v. McPherson*, Criminal Action No. 76-136 (D.D.C.). For a brief of that case, see the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

### *Cervase v. Architect of the Capitol*

No. 77-1149 (Third Cir.)

*Brief.*—This action was filed on June 17, 1976, by John Cervase, "a citizen and a taxpayer of the United States and New Jersey", against the Architect of the Capitol and the Congressional Black Caucus, Inc. The plaintiff states that the Architect of the Capitol (hereinafter "Architect") controls and supervises the House Office Buildings; that the Congressional Black Caucus, Inc. (hereinafter "CBC") is a private nonprofit corporation organized in 1971 to promote the interests of black citizens, and that: (1) it selects its members on the basis of race, (2) all of its current members are black Members of Congress, (3) it is a tax exempt organization, (4) it has not been issued a nonprofit mailing permit, and (5) it has its permanent office and headquarters in House Office Building Annex No. 1.

Mr. Cervase further alleges that the CBC has unlawfully occupied the office space and unlawfully used U.S. Government furniture, and utility, security, maintenance, repair, communications



and other services, and that in addition CBC has not reimbursed the U.S. Government for the costs of the office, goods, and services used. He charges that the Architect owes him and the public at large the duty to initiate legal proceedings to evict the CBC and collect damages from them for their unlawful use of office, goods and services, that the Architect has breached his duty by not taking these actions, and that this breach of duty has injured him and the public at large "by permitting (a) a private organization to use public offices, goods and services for private purposes, (b) invidious racial discrimination on public property, and (c) public money to be spent for private purposes." The complaint prays for: (1) a declaratory judgment that the CBC has unlawfully occupied its office space and used U.S. Government goods and services, and that the CBC unlawfully selects its members on the basis of race; (2) a *mandamus* directing the Architect to initiate legal proceedings to evict the CBC from its office and to collect damages from them for their unlawful use of office, goods and services, and to initiate legal proceedings to evict the CBC from any public building within the Architect's jurisdiction if the CBC is selecting its members on the basis of race; (3) an order directing the defendants to pay plaintiff's costs; and (4) such other relief as the court may deem just and proper.

On December 16, 1976, the court dismissed the action in a brief order. [*Cervase v. Architect of the Capitol*, Civil Action No. 76-1164 (D.N.J. Dec. 16, 1976).]

Plaintiff filed a notice of appeal on December 27, 1976.

On October 11, 1977, a judgment order affirming the judgment of the District Court, and taxing costs against appellant Cervase was filed.

*Status*.—The time for appeal has expired.

### ***United States v. Elko***

Criminal Action No. CR 77-739-ALS (C.D. Calif.)

and,

### ***Brislin v. United States***

No. 78-1558 (Ninth Cir.)

*Brief*.—On June 9, 1977, an indictment was filed in the United States District Court for the Central District of California charging Stephen B. Elko and Patricia Brislin with the following offenses: Conspiracy (18 U.S.C. § 371); perjury (18 U.S.C. § 1623); subornation of perjury (18 U.S.C. § 1622); obstruction of justice (18 U.S.C. §§ 1503; 1510); and aiding and abetting interstate travel to commit bribery, (18 U.S.C. § 2). Additionally, Elko was charged with interstate travel to commit bribery (18 U.S.C. § 1952).

The indictment charged that Mr. Elko, while serving as Administrative Assistant for Representative Daniel J. Flood, conspired with Miss Brislin and unindicted co-conspirators William Fred Peters and others to accept bribes and did accept bribes in exchange for using Mr. Elko's position as Representative Flood's Administrative Assistant to attempt to secure accreditation and extensions of eligibility for five unaccredited trade schools located in Los Angeles to participate in various Federal financial aid programs. The schools are owned by Automation Institute of Los Angeles, a corporation of

which Mr. Peters was president. The indictment further charged that the defendants and the co-conspirators committed various overt acts in furtherance of the conspiracy, including giving false testimony before a Federal grand jury in Los Angeles.

On June 20, 1977, defendants entered pleas of not guilty.

On August 1, 1977, defendants' motion to dismiss the indictment was denied.

On September 27, 1977, a trial by jury was begun. At that time, count seven of the indictment, which charged defendants with procuring Deryl Fleming to commit perjury before a Federal grand jury, in violation of 18 U.S.C. § 1622 was dismissed and paragraph 1a of count four, which also related to procuring and committing perjury before the same grand jury, in violation of 18 U.S.C. § 1503 was stricken on motion of the Government.

On October 19, 1977, defendants were found guilty on all remaining counts.

On November 10, 1977, defendants' motion for a judgment of acquittal or a new trial was denied.

The defendants were sentenced on January 9, 1978. Defendant Elko was sentenced to 3 years on each of counts one through five, to run concurrently, for a total of 3 years. Defendant Brislin was sentenced to 1 year on each of counts one, three, four and six to run concurrently for a total of 1 year.

*Status.*—Defendants filed motions for reduction of sentence on February 22, 1978. On March 6, 1978, defendant Brislin's motion for reduction of sentence was denied. Defendant Elko's motion was stayed for study for possible modification.

Defendant Brislin filed a notice of appeal on March 16, 1978.

### *Doe v. McMillan*

No. 77-1027 (U.S. Supreme Court)

*Brief.*—Plaintiffs, parents of certain pupils at a junior high school in the District of Columbia, filed this action in the U.S. District Court for the District of Columbia against the then-Chairman of the House District Committee, members of the committee, some committee staff, the Superintendent of Documents, the Public Printer, and various officials of the public school system of the District.

The complaint alleged that a report issued by the committee entitled "Investigation and Study of the Public School System of the District of Columbia," [H. Rept. 91-1681 (1970)], contained certain derogatory information regarding named students—specifically, attendance lists, disciplinary letters and memoranda, test papers and other school documents—and asked for declaratory and injunctive relief and damages.

The District Court denied plaintiffs' motion for a temporary restraining order and dismissed the complaint. In a motion before the U.S. Court of Appeals for the District of Columbia circuit, plaintiffs then sought summary reversal of the dismissal, or, in the alternative, an injunction against the printing and distribution of the report pending action on the appeal. Motions for summary affirmance of the dismissal were filed by defendants.

An order was issued by the Court of Appeals enjoining all defendants, except the members of the House District Committee, from the further printing and distribution of the report—unless the offending matter was deleted—in order to preserve the status of the parties until the case could be heard by the court on the merits.

In a subsequent action, the court denied the motions for summary affirmance and reversal of the District Court dismissal of the complaint and modified its earlier order to permit distribution of the report—excluding only the student test papers and disciplinary correspondence—again, until the case could be heard on the merits.

A motion was then filed on behalf of Representatives Brock Adams, Charles C. Diggs, Jr., Donald M. Fraser, Gilbert Gude, and Andrew Jacobs, Jr.—all then members of the committee—to sever them as defendants and dismiss their appeal. This motion was granted upon their stipulation that they opposed distribution of the report—so long as the students were identified—and that they would have voted against publication of the report in its present form, had they been afforded the opportunity to do so in committee.

Arguments on the merits were heard by the Court of Appeals in June 1971, and the dismissal of the action was affirmed by that court in a 2 to 1 decision on January 20, 1972.

Judge George E. MacKinnon, in his majority opinion for the court, held the dismissal of the action, as to the Federal legislative employees—in which category he included the members and employees of the committee named as defendants and the Superintendent of Documents and Public Printer—to be proper due to their legislative immunity under the provisions of Article I, Section 6 of the Constitution. This section, the well-known Speech or Debate clause, provides that “for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place.”

Judge MacKinnon stated:

The Speech or Debate Clause not only provides a defense on the merits, but it generally protects a legislator from the annoyance of having to devote his time and efforts to defending himself in court. \* \* \* The only question which a trial court should consider is ‘whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative activity.’ \* \* \* Since we believe that the activities of the defendant-members of the Committee \* \* \* ‘may fairly be deemed within [the Committee’s] province,’ it is clear that the District Court properly dismissed the suit as to them.

\* \* \* \* \*

‘Our function, at this point, is \* \* \* not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field.’ \* \* \* It was merely to determine whether the defendant-legislators were acting within the sphere of their legitimate activity when they collected the information in question and issued the House Committee Report in its

present form. Since it is readily apparent that their actions were within the discretionary area of their constitutional authority, the defendant-Representatives are absolutely protected by the Speech or Debate Clause. [*Doe v. McMillan*, 459 F.2d 1304, 1312-14 (D.C. Cir. 1972) (citations and footnotes omitted).]

With specific reference to the legislative branch defendants, other than Members of Congress, Judge MacKinnon continued:

The legislative immunity provided by the Speech or Debate Clause is not limited to Congressmen, although the doctrine's protection is less absolute \* \* \* when applied to officers or employees of a legislative body, rather than to legislators themselves. \* \* \* Therefore, when congressional employees or officers are acting pursuant to valid legislative authorization, in furtherance of a proper legislative purpose, they also come within the scope of the Speech or Debate Clause protection. [459 F.2d at 1314.]

The other defendants—officials and employees of the public school system of the District—were held to be immune from liability under the judicially created doctrine of official immunity, as defined by the Supreme Court in *Barr v. Matteo*, 360 U.S. 564 (1959). In that decision, the Court stated that:

\* \* \* officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. [*Barr v. Matteo*, 360 U.S. 564, 569 (1959).]

The court included the employees of the legislative branch in this immunity for Government officials, affording them this protection in addition to the Speech or Debate clause immunity.

Judge MacKinnon noted, further, that the action of the District Court was proper on the basis of the constitutional doctrine of separation of powers.

A petition for a writ of *certiorari* was filed by plaintiffs in the Supreme Court on March 17, 1972. The Court granted *certiorari* on June 26, 1972, and heard arguments in the case on December 13, 1972.

Justice White wrote the opinion for the majority of the Court, handed down on May 29, 1973, in which he was joined by Justices Douglas, Brennan, Marshall and Powell.

Justice White described the scope of the inquiry of the Court as "whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals." [*Doe v. McMillan*, 412 U.S. 306, 314 (1973).]

He then declared that there must be some "reasonable bounds" for legislative tasks.

Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn v.*



*Thompson*, \* \* \* 103 U.S. 168 (1880), but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the sergeant-at-arms in *Kilbourn v. Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be 'without authority.' *Id.*, at 200. \* \* \* The Clause does not protect 'criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction.' *Gravel v. United States*, \* \* \* 408 U.S. 606, 622 (1972). Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function. [412 U.S. at 315-316.]

He concluded that on the record before the court it was impossible to determine whether the publication of the documents outside of Congress went beyond legitimate legislative need and thus beyond the limits of Speech or Debate clause immunity.

Finding that the Members of Congress and personnel of the House committee had done nothing more than "conduct the hearings, prepare the Report, and authorize its publication," and that complaint had thus been properly dismissed as to them, Justice White turned his attention to the officers of the Government Printing Office named as defendants—the Superintendent of Documents and the Public Printer. [The Court stated in a footnote that the public school officials were not subject to injunctive relief at this time due to the adoption of new policies concerning the handling of confidential information.]

The Printing Office defendants were described as enjoying the protection of the Speech or Debate clause "to the extent that they serve legislative functions, the performance of which would be immune conduct if done by congressmen. \* \* \*" [412 U.S. at 420.]

Justice White concluded that the independence of the establishment of the Printing Office did not carry with it an independent immunity for its functions.

Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the materials. Under such a holding, the department would have a seemingly foolproof method for manufacturing immunity for materials which the court would otherwise hold immune if not sufficiently connected with the 'official duties' of the department. [412 U.S. at 323.]

Justice Douglas wrote a separate, concurring opinion, in which Justices Brennan and Marshall joined. He described the issue as whether the report infringed upon the constitutional rights of the

school children named in the report, and concluded that the naming of the school children was "totally irrelevant to the purposes of the study" and that the bounds of legitimate legislative activity had been exceeded.

Chief Justice Burger filed an opinion in which he concurred in the grant of immunity to the Members of Congress and their staff aides and dissented from the majority's holding that the Superintendent of Documents and Public Printer could be liable for public distribution of the printed report.

Justice Rehnquist, in an opinion in which he was joined by the Chief Justice and Justice Blackmun and, in part by Justice Stewart, concurred in the holding of the majority granting immunity to the Congressional defendants. In contrast to the majority, however, he concluded that the Speech or Debate clause confers immunity upon congressionally authorized public distribution of committee reports. Finally, Justice Rehnquist stated:

Entirely apart from the immunity conferred by the Speech or Debate Clause on these respondents, I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executives Branches. \* \* \* But the prospect of the District Court enjoining a committee of Congress, which, in the legislative scheme of things, if for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution. [412 U.S. at 343-44.]

In a separate opinion, Justice Blackmun, joined by the Chief Justice, concurred in part and dissented in part to the holding of the majority and added comments of his own to Justice Rehnquist's opinion, in which he had joined. Justice Blackmun stated:

Although it is regrettable that a person's reputation may be damaged by the necessities or the mistakes of the legislative process, the very act of determining judicially whether there is 'substantial evidence' to justify the inclusion of 'actionable' information in a committee report is a censorship that violates the congressional free speech concept embodied in the Speech or Debate Clause and is, as well, the imposition of this Court's judgment in matters textually committed to the discretion of the Legislative Branch by Art. I of the Constitution. [412 U.S. at 337.]

On remand the District Court dismissed the action against the Printer and Superintendent concluding that the record before it established that the extent of the distribution and publication of the report was not in excess of the legitimate legislative need of the Congress. Additionally, the District Court refused to allow the plaintiffs to amend their complaint to allege public distribution of the report by the Congressional defendants and to join, as a party-defendant, a District of Columbia school official.

On both of these holdings the plaintiffs appealed, and on each, in an opinion issued on July 29, 1977, the Court of Appeals affirmed the lower court's ruling.

As to the dismissal of the action against the Printer and the Superintendent, the appeals panel concluded, as did the lower court, that their publication and limited distribution of the report to Federal Government agencies and to some members of the public were within the legitimate needs of the Congress and thus protected by the Speech or Debate clause. The court noted that distribution to Government agencies of Congressional reports allows those agencies to comment to the Congress upon proposed legislation which may directly affect the agency. The court also concluded that the limited distribution of the report to some individuals outside the Government was similarly within the legislative needs of the Congress. Distribution of Congressional reports, the court noted, permits individuals whose interest may be affected by proposed Congressional action to take steps to petition their Government, a right protected by the First Amendment of the Bill of Rights. On this point, the Court noted that the distribution to the public which occurred in this case was in response to standing requests by those individuals to receive all Congressional reports, and so, the Court added, it reached no conclusion as to what the result might be in an action in which distribution was made in response to a specific request or continued for a period after notice of objection was received.

The Court next declared that even if the Printer and Superintendent were not protected by Speech or Debate clause immunity, the doctrine of official immunity would nonetheless shield them in this instance. Such a qualified immunity, the Court noted, would protect the officials because they had acted in their official capacity in good faith and in the reasonable belief in the legality of their actions.

As to the plaintiffs' attempt to amend their complaint to allege distribution of the report by the Congressional defendants and to add a new party-defendant, the Court noted that the case had been before the District Court, the Court of Appeals and the Supreme Court for more than 38 months before the plaintiffs first sought to so amend their complaint. When such a tardy filing occurs, it is within the discretion of the District Court to deny leave to amend. The Court concluded that the District Court's denial of leave to amend was not an abuse of its discretion.

On October 13, 1977, the Court of Appeals denied appellants' petition for rehearing.

Circuit Judge Leventhal filed a statement concurring in the denial of the petition for rehearing. The principal ground of appeal concerned the ruling of the District Court, which was sustained by the Court of Appeals, that the distribution of the report was entirely routine and usual and did not exceed the legitimate legislative needs of the Congress, according to Judge Leventhal who stated he concurred in that ruling. The attempt to amend the complaint to allege participation by the Congressional defendants in the public distribution was characterized in the statement as a subsidiary issue and as requiring the plaintiffs to supply, before pressing any



claim to discovery, at least a concrete factual indication that there was indeed a "public" distribution.

On December 6, 1977, appellants applied to the Supreme Court of the United States for an extension of time to file a petition for *certiorari*. The application was granted and on December 8, 1977, the time to file was extended to February 13, 1978.

The petition for *certiorari* was filed on January 19, 1978.

*Status.*—The petition for *certiorari* was denied on April 17, 1978, by the U.S. Supreme Court.

The complete text of the opinion of the Court of Appeals of January 20, 1972 is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1972.

The complete text of the opinion of the Supreme Court is printed in a special report of *Court Proceedings and Actions of Vital Interest to the Congress*, May 29, 1973.

The complete text of the opinion of the Court of Appeals of July 29, 1977 is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interests to the Congress*, Part 2, August 15, 1977.

The complete text of the order of the Court of Appeals of October 13, 1977 and the concurring statement appears in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

### ***Common Cause v. Bailer (formerly Klassen)***

Civil Action No. 1887-73 (D.D.C.)

*Brief.*—Originally filed on October 5, 1973, this action seeks declaratory and injunctive relief against the Postmaster General, B. F. Bailer, and the Secretary of the Treasury for actions they allegedly performed or failed to perform, in the course of their official duties relating to the Congressional franking privilege.

Plaintiffs, Common Cause and John W. Gardner, then-Chairman of Common Cause, amended their original complaint on March 12, 1974, following the enactment of the Franking Act of 1973 [Pub. L. 93-191] on December 18, 1973, to incorporate references to the new statutory language.

Plaintiffs allege that the use of the frank for newsletters and news releases by a Member of Congress—then a candidate for nomination or election or engaged in fundraising for a candidacy—and the use of the frank on mail matter such as condolences, biographies, pictures or writings laudatory or complimentary to a Member on the basis of performance of official duties: (1) abridges plaintiffs' First Amendment rights; (2) denies their Fifth Amendment rights; (3) is an unlawful appropriation of public funds for nonpublic purposes; (4) violates the Postmaster General's statutory duty; and (5) is an unlawful disbursement of public funds contrary to the statutory duties of the Secretary of the Treasury.

On May 31, 1974, the defendants filed a motion to dismiss, together with supporting memorandum, asserting as grounds that:

The court lacks jurisdiction over the subject matter of this action in that neither of the above-named defendants are proper parties to this proceeding, the plaintiffs have failed



to exhaust the administrative remedies available to them, the plaintiffs lack standing to maintain this action, and \* \* \* the complaint fails to state a claim upon which relief may be granted. [Defendants' motion to dismiss, May 31, 1974.]

On June 14, 1974, plaintiffs filed a memorandum in opposition to the defendants' motion to dismiss as well as an application to convene a three-judge District Court. On June 26, 1974, U.S. District Judge John H. Pratt, denied without opinion defendants' motion to dismiss. On July 1, 1974, Judge Pratt signed an order convening the three-judge District Court requested by the plaintiffs. A week later, on July 8, 1974, the defendants filed their answer to the amended complaint.

Since September 9, 1974, plaintiffs have attempted to depose and serve subpoenas *duces tecum* on numerous current and former Congressional employees. A partial list follows: Victor C. Smioldo, Staff Director of the House Commission on Congressional Mailing Standards; Benjamin R. Fern, Chief Counsel, the Senate Select Committee on Standards and Conduct; David Ramage, House Majority Clerk; Thomas J. Lankford, House Minority Clerk; Joseph J. Fahey, Supervisor of the Senate Folding Room; Edmund L. Henshaw, then Assistant Sergeant at Arms of the House; John M. Swanner, Staff Director of the House Committee on Standards of Official Conduct; Eli Bjellos, Chief of the House Publications Distribution Service; Harold Needham, Superintendent of the Senate Services Department; James Estep, Manager of the Senate Computer Center, Buehl Berentson, Executive Director of the National Republican Senatorial Committee; Bill Goodwin of the National Republican Senatorial Committee; Lee MacGregor, former Aide to Senator Robert Griffin; Joyce Baker, a former employee of the Senate Republican Policy Committee; Richard Conlon, Staff Director of the House Democratic Study Group; Lynda E. Clancey, Richard P. Clifton, and Glee Gomien, Staff Assistants of the Republican Senatorial Campaign Committee; Jay Bryant, Special Assistant in the Office of the Minority Whip; Edward L. Beach, Staff Director and Secretary of the Senate Republican Policy Committee and Senate Republican Conference; Edwin F. Feulner, Executive Director of the House Republican Study Committee; Patricia Goldman, Director of the Wednesday Group; and Jay D. Sterling, Executive Director of the House Republican Research Committee.

On October 9, 1974, the Senate passed S. Res. 423 regarding Mr. Fern, and on October 11, 1974, passed S. Res. 431 regarding Messrs. Estep, Needham, and Fahey. The resolutions stated that by the privileges of the Senate no evidence of a documentary character under the control and in the possession of the Senate may be taken, without its permission, by the mandate of process of ordinary courts of justice; that the employees were authorized to appear before the court but not to take with them any papers or documents on file in their offices or in their possession; and that when the court determined that any of the subpoenaed documents and papers had become part of the official transcripts of public proceedings of the Senate, and that they were material to the case, the court could receive copies of the documents. On November 22,

1974, a similarly worded S. Res. 436 was passed regarding, Joyce Baker.

The subpoenas of House employees Bjellos, Swanner, Smirollo, Ramage, and Lankford were presented by the Speaker to the House for its consideration on September 30, 1974. When the employees failed to appear for their depositions, plaintiffs filed motions to compel their testimony.

On October 21, 1974, two of the subpoenaed employees, Eli Bjellos and John Swanner, after receiving a copy of the motion filed by the plaintiffs to compel their testimony wrote letters to Judge Pratt.

In these letters, each informed Judge Pratt of his view that both by statute and by custom of the House, they were forbidden to testify or to remove documents belonging to the House without the permission of the House. The letters also informed Judge Pratt that the question of the subpoenas was under active consideration by the House and that the two men were therefore awaiting further guidance from the House on the course of action they should follow.

On December 18, 1974, the House adopted H. Res. 1517 which was similar to the Senate resolutions, except that it resolved that:

When it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the House is needful for use in any court of justice or before any judge or such legal officer, for the promotion of justice, this House will take such action thereon as will promote the ends of justice consistently with the privileges and rights of the House. [H. Res. 1517, 93d Cong. 2d Sess. (1974).]

On January 23, 1975, the House again took up the matter of the subpoenas in H. Res. 85, which observed that:

a large variety and volume of [the materials sought by plaintiffs from the five House employees] do not appear to bear any essential relationship to the causes of action and relief requested in the plaintiffs amended complaint.  
\* \* \* [H. Res. 85, 94th Cong. 1st Sess. (1975).]

The resolution also stated that, consistent with its privileges, the House would act "to promote the ends of justice \* \* \* upon a determination of relevancy by the \* \* \* court," and it authorized the Speaker to appoint counsel to represent the House and its employees in the proceedings.

On January 27, 1975, oral argument was held on a renewed motion to dismiss which had been submitted by the defendants. This motion raised the same arguments that had been made in defendants' first motion to dismiss, and made the additional allegation that plaintiffs had failed to join an indispensable party—the Congress—as required by Rule 19 of the Federal Rules of Civil Procedure.

Also discussed at the beginning of the January 27 hearing were the subpoenas which plaintiffs had issued. Counsel for the plaintiffs, in answering an inquiry regarding the mass of material being

sought, stated that although the challenge was to the constitutionality of the franking laws on their face, the discovery was necessary to show that the statute was designed for and was being used for political purposes. The court suggested that perhaps the volume of material sought could be reduced, probably through stipulation between counsel, since the ultimate argument seemed to be on constitutional issues in which the facts involved would be rather undisputed. The court directed plaintiffs to submit an itemized list of the documents it was seeking within 10 days after it ruled on the motion to dismiss, if its ruling was a denial of the motion.

By a memorandum and order of February 10, 1975, the court denied the defendants' renewed motion to dismiss. In rejecting the defendants' argument that the plaintiffs had failed to exhaust their administrative remedies, the court wrote:

The claim that plaintiffs have not exhausted their administrative remedies in failing to file complaints concerning violations of the statute with the House Commission on Congressional Mailing Standards or the Select Committee on Standards and Conduct of the Senate has no merit. Plaintiffs make no contention that there have been abuses or violations of the statute, consideration of which are in the sole jurisdiction of the House Commission or the Senate Committee, but rather that the statute on its face is unconstitutional, a matter beyond the jurisdiction of such bodies. Obviously, the House Commission and Senate Committee have no power to declare an act of Congress unconstitutional. It is well settled that the doctrine of exhaustion does not apply where the administrative process is inadequate to dispose of the constitutional claim. *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752 (1947). [*Common Cause v. Klassen*, Civil Action No. 1887-73 (D.D.C. 1975); Slip Opinion at 2.]

In addition, the court said, neither Congress nor the membership of Congress is an indispensable party—and though defendants' third allegation—that plaintiffs lacked standing to sue—was more serious and required further exploration, it too, was without merit:

Plaintiffs sue as taxpayers with a taxable income of over \$6 billion annually and federal tax liability in excess of \$1 billion each year. They assert that federal funds appropriated under the franking privilege are being used to finance the distribution of partisan political literature specifically authorized by Section 3210 and that such expenditures of federal funds violate the limitations upon the taxing and spending power of Congress under Article I, Section 8, and contravene the First and Fifth Amendments of the Constitution.

Just as importantly, plaintiffs claim status as registered voters, representatives of registered voters, candidates for Congressional office, and supporters of candidates. It is alleged that over fifty members of Common Cause challenged incumbent members of Congress in the last election and many of its members supported challengers to incumbents. They assert that the present franking privilege confers substantial political benefits upon incumbents, while



nonincumbent challengers and their supporters do not have the same advantage. As a result, the rights of challengers and their supporters to freely associate for political purposes are impaired, and the value of their votes is diluted and diminished, all in violation of the First Amendment. [*Baker v. Carr*, 369 U.S. 186 (1962).] In addition, it is alleged that this practice invidiously discriminates in favor of incumbent members in violation of the due process clause of the Fifth Amendment. In short, as citizens with a particularized interest in the electoral process, plaintiffs claim standing to attack Section 3210 as violative of their constitutional rights.

From the foregoing brief discussion, it is clear to us that the plaintiffs have met the test laid down in [*Flast v. Cohen*, 392 U.S. 83 (1968)] and subsequent cases. They have asserted (1) an injury in fact, not a generalized complaint common to all citizens and taxpayers, and they have demonstrated (2) a nexus between the injuries suffered and the constitutional infringements alleged. [Slip Opinion at 3-4.]

On February 21, 1975, plaintiffs submitted their "Itemized List of Documents Subpoenaed from House Employees." From Victor Smiroldo, Staff Director and Counsel of the House Commission on Congressional Mailing Standards, and John M. Swanner, Staff Director of the House Committee on Standards of Official Conduct, plaintiffs sought:

\* \* \* all complaints concerning possible violation of the franking statute, and attachments thereto, or copies thereof, brought to the attention of the Commission and all memoranda or other writings or copies thereof which relate to or reflect the disposition of these complaints[;]

\* \* \* all advisory opinions and attachments thereto, or copies thereof, which relate to the mailing or contemplated mailing of franked mail, issued to any Member of the House of Representatives or Member-elect surviving spouse of any of the foregoing persons, or other House of Representatives officials, their agents or employees[;]

\* \* \* all letters, memoranda or other writings, and attachments thereto, or copies thereof, which relate to or reflect information, guidance, assistance, advice or counsel given in connection with the mailing or contemplated mailing of franked mail[;]

\* \* \* all formal or informal correspondence, or copies thereof received by the Commission requesting information, guidance, assistance, advice or counsel in connection with the mailing or contemplated mailing of franked mail[;]

\* \* \* all informal opinions and attachments thereto, or copies thereof, issued by the Commission concerning use of the franking privilege[; and]

\* \* \* all regulations or proposed regulations or copies thereof, governing the proper use of the franking privilege by any Member of the House of Representatives or Member-elect, surviving spouse of any of the foregoing, or other House of Representatives official, entitled to send



mail as franked or any employee or agent of any and all of the foregoing persons. [Itemized List of Documents Subpoenaed From House Employees, filed February 21, 1975.]

From David Ramage and Thomas Lankford, respectively the Majority and Minority Clerks of the House of Representatives:

\* \* \* all documents, correspondence, memoranda, worksheets and other writings, or copies thereof, which reflect or relate to the printing or preparation of Congressional newsletters or news releases by the House Majority Room from December 31, 1973 through the date of this subpoena[; and]

\* \* \* all documents, correspondence, memoranda, and other writings, or copies thereof, including but not limited to books, records or receipts, which relate to or reflect a bill or payment for services provided by the House Majority Room in printing or preparing Congressional newsletters or news releases provided between December 3, 1973, and the date of this subpoena. [*Id.*]

From Eli S. Bjellos, Chief of the House Publications Distribution Service:

\* \* \* all documents, correspondence, memoranda, worksheets and other writings, or copies thereof, which reflect or relate to the monthly work units of the Publications Distribution Service from January 1, 1967 through the date of this subpoena[;]

\* \* \* all documents, correspondence, memoranda, and other writings, or copies thereof, including but not limited to books, records or receipts, which relate to or reflect a bill or payment for services provided by the Publications Distribution Service for the period from December 1, 1973 to the date of this subpoena[; and]

\* \* \* all documents, correspondence, memoranda, and other writings or copies thereof, which relate to or reflect the manner of, or handling of mass mailed matter, including, but not limited to instructions on the handling of Congressional newsletters for the period from December 1, 1973 to the date of this subpoena. [*Id.*]

Plaintiffs had also sought documents from certain Senate employees and when the employees, pursuant to the instructions of the Senate, failed to produce them, plaintiffs filed a motion to compel the production of the documents. On May 21, 1975, Senate employees Fern, Needham, and Estep filed memoranda in opposition to plaintiffs' motion to compel them to produce documents, stating that the records sought were not material to the subject matter of the pending litigation, which is that the franking statute is unconstitutional on its face, and the records sought involve use of the frank in specific instances, which question is not in issue. Furthermore, they stated that the records are internal administrative records of the Senate which are privileged; that the use of the Senate folding room and computer are part of the pay and allowance of Members of Congress which is a policy question and not a legal one; and, in Mr. Fern's case, that the lawyer-client privilege applies. Later the three Senate employees filed supple-

mental memoranda invoking the decision of the Supreme Court in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), as supporting their position of legislative immunity for the records.

On June 17, 1975, House employees Bjellos, Swanner, Smirollo, Ramage and Lankford filed their memorandum in opposition to plaintiff's motion to compel testimony and the production of documents. It claimed that plaintiffs' discovery should not be allowed since the data sought were irrelevant to a facial attack upon the constitutionality of the franking act, the information is privileged against forced disclosure under the Speech or Debate clause of the Constitution, and the subpoenas were needlessly burdensome.

The motion by plaintiffs to compel testimony and the production of documents was argued on July 16, 1975. On July 30, 1975, the court issued a memorandum and order which stated that:

Objections to this attempted discovery are phrased in terms of (1) irrelevance (2) burdensomeness and (3) constitutional immunity under Article 1, Section 6 (The Speech and Debate clause) or Article 1, Section 5 (power of each body of Congress to enact its own rules).

The claim of lack of relevance is predicated on the narrow theory that, irrespective of the relevance of the requested materials in other frames of reference, they are simply irrelevant in a case where the gravamen of the complaint is that the statute complained of is alleged to be unconstitutional on its face. Aside from plaintiffs' continuing burden of maintaining standing, it is clear to us that a proper resolution of the issues raised by the complaint calls for a complete record consisting of the type of documentary materials sought to be discovered. For this reason, we hold these materials to be relevant and necessary.

Likewise, the claims of constitutional immunity are without weight. The *Brewster* case [*United States v. Brewster*, 408 U.S. 501 (1972)] and others clearly demonstrate that Congressional immunity is limited to legislative activities and the claimed use of the franking privilege for political activities is not covered even by a most expansive definition of the Speech and Debate clause. That the use of the franking privilege is not within the language of Article 1, Section 5, requires no discussion.

The claim of burdensomeness is more serious. On the one hand, the materials requested are relevant to the issues raised by the complaint and plaintiffs are entitled to a substantial degree of discovery. On the other hand, there may be problems concerning the sheer bulk of the materials requested, about which we are not presently apprised. In addition, considerations of fairness dictate that the names of the individual members of Congress not be disclosed, as far as it is possible to achieve this result without unduly hampering the full and expeditious processing of this lawsuit. Where possible, submission under protective order may be a reasonable alternative.

Fortunately, as to the House employees, we are not presently faced with any of these problems since these employ-

ees through counsel have offered to submit voluntarily information respecting the use of franked mail broken down as to (1) categories of congressional membership to compare frequency and volume of franked mail as it varies between members depending on estimated difficulties to be faced at primary or at election, (2) sources of payment for materials mailed, and (3) certain non-public interpretive materials, including but not limited to advisory opinions and more informal advice. We commend this effort of House defendants' counsel and urge counsel for plaintiffs to consider and determine the adequacy of such proposal and, if unable to agree with House employees' counsel, to be prepared to demonstrate the need of further materials.

Unlike the House employees, the Senate employees have made no move to supply any of the requested materials. Being satisfied as to plaintiffs' entitlement to substantial discovery, we herein require that counsel for Senate employees confer with plaintiffs' counsel in an effort to work out an accommodation along the general lines of the proposal made on behalf of the House employees. [Memorandum and Order, *Common Cause v. Bailer*, Civil Action No. 1877-73 (D.D.C. 1975); Slip Opinion at 3-4.]

The court granted plaintiffs' motion to compel discovery from the Senate and House employees, "it being understood that the exact nature and bulk of the materials to be produced are left to further negotiation between counsel for the respective parties."

On March 1, 1976, the court issued an order approving a stipulation between plaintiffs and Senate employees Estep and Needham, and a stipulation between plaintiffs and House employees Ramage, Lankford, Bjellos and Smirolodo.

The stipulation regarding Estep, Manager of the Senate Computer Center, and Needham, Superintendent of the Senate Services Department stated that plaintiffs were to receive a "User's Guide for the Senate Computer Center" and a description of the computer programs used; a compilation of the work orders from Senators designating the categories of individuals who are to receive franked mail, the work order number and week thereof; a compilation detailing the categories of names maintained by the Senate Computer Center for each Senator, the number of names in each category, and the code designation of each category; the number of address labels affixed to franked mail for each Senator for each day or week; and the right to inspect copies of newsletters in the possession of the Senate Service Department. The stipulation further provided that Estep and Needham would not be further deposed.

Additionally, a protective order was issued defining: (1) the information on the volume of mail for each Senator that may be publicly filed; (2) the information that is to be available to plaintiffs' counsel under seal; and (3) the extent to which the information available to plaintiffs' counsel under seal may be publicly filed in this action. The Senate employees will be given a list of all Senators with certain characteristics of the State each represents, voting percentages in elections since 1966, information on reelection, section of the country, and other general information. The



Senate employees will then substitute a code for the name of each Senator, the key to which will be kept in camera and not made available to plaintiffs or defendants or their counsel or anyone else. If a party needs the information he must first serve notice on the Senate employees' counsel. Finally, all documents sought by plaintiffs from others will first be submitted to the court and the code will be substituted for the Senator's name, deponents and witnesses will use only the code, and plaintiffs will refer to individual Senators only by their code.

As for Senate employee Fern, Chief Counsel of the Senate Select Committee on Standards and Conduct, the court stated:

Plaintiffs seek production of the following internal documents of the Senate Select Committee on Standards and Conduct:

(A) The actual text of (a) all complaints to the Select Committee concerning the use of the frank by Members of the Senate and the disposition thereof, (b) all written requests from Members of the Senate to the Select Committee for advice concerning the use of the frank and the written responses thereto and (c) deponent Fern's notes or other memoranda concerning oral requests for advice and oral responses, or, in lieu of the actual text of the documents, a summary of each document with the full document made available to plaintiffs' counsel to verify the accuracy of the summaries; and

(B) All internal memoranda of the Committee concerning the use of the frank which have been approved by the Select Committee or used as the basis for rendering advice to Members of the Senate.

Actual text was defined by plaintiff's counsel as a copy of the full text of the document or the original document itself, with only the identification of the Senator deleted. [Order, *Common Cause v. Bialar*, Civil Action No. 1887-73 (D.D.C. March 1, 1976); Slip Opinion at 3.]

The court noted that after the Select Committee had decided not to allow Mr. Fern to produce the documents, the Senate on December 17, 1975, had adopted a resolution reaffirming a previous Senate resolution prohibiting the disclosure of the internal records of the Select Committee. On January 27, 1976, the Select Committee had again considered the matter and determined that under order of the Senate it could make no change in its position. Fern had offered to supply summaries of documents in list (A) above, but plaintiffs had insisted upon inspection of the actual records to insure the accuracy of the summaries, and the Select Committee had rejected this proposal. The court continued:

We have given careful thought to the contentions of the parties. It is conceded that the documents themselves are relevant to the issues in this case. Whether the documents are privileged may be determined by whether they relate



to the business of Senators or the business of candidates for the Senate. This approaches a capsule description of the ultimate issue in this case. We can agree that a privilege for Senatorial documents exists, without deciding that these documents are Senatorial and therefore privileged.

At this stage in the lawsuit we think it better to act as if the documents were Senatorial and privileged, with the ultimate decision reserved. Inspection by plaintiff's counsel, even with all safeguards, would in some sense defeat the privilege, if in ultimate analysis these documents were found to be properly entitled to protection. However, there is no doubt that the privilege claimed, if it exists, is not absolute but is defeasible upon a showing of proper need. As the recent Watergate experience has taught us, a President's claim of absolute privilege on the grounds of confidentiality must yield when a proper showing is made that the overriding considerations of the public interest require disclosure. The body to make such a determination is the judiciary after an in camera inspection of the material. *United States v. Nixon* [418 U.S. 683 (1974)].

It is our judgment that plaintiffs have up to this point failed to demonstrate the showing of particular need to overcome the Select Committee's claim of privilege. It may well be that the summaries themselves plus additional discovery in other areas will satisfy the plaintiffs' evidentiary problems and will make it unnecessary for us to order at this time the production of the documents themselves. On the other hand, we see no reason why Mr. Fern should not be required also to supply summaries of "all internal memoranda" described in subparagraph (B) above. It is understood that the entire file of original documents is quite limited in size. Accordingly, it is by the Court,

Ordered, that plaintiffs' motion to compel production of original documents by the witness Fern be and is hereby denied without prejudice; and it is

Further ordered, that the witness Fern be and is hereby ordered to produce summaries of all documents covered in subparagraphs (A) and (B) above. [*Id.* at 4-5.]

The stipulation with the House employees stated that plaintiffs will receive: (1) the sources of funds used to defray printing costs for mass-mailed franked materials on a per seat breakdown, and the banks and account numbers where the proceeds of the printing operations are kept; and (2) access to the files of the House Publications Distribution Service (PDS) for the purpose of preparing compilations of the per seat volume and timing of franked mail, with the research and results to be done either by PDS at plaintiffs' expense or by plaintiffs, with PDS then compiling the information and using a code for a Member's name. The information will then be compiled and coordinated with coded numbers and a coded list of the attributes of the Member similar to those of the Senate, with similar access and protections. Plaintiffs will also receive from Mr. Smiroldo of the House Commission on Congressional Mailing Standards, at plaintiffs' expense:

copies of all documents and other writings pertaining to all formal complaint proceedings, pending or completed. In addition, plaintiffs will receive copies of all documents in the files of the Commission that embody (a) formal or informal advice rendered by the Commission and/or its staff to Members of Congress regarding their use of the franking privilege; or (b) policy statements or regulations of general applicability adopted by the Commission regarding permissible uses of the franking privilege by Members of Congress; or (c) communications of the Commission or its staff with third parties outside the House of Representatives that relate to the franking privilege. The only omissions from these materials will be such details as identify a particular Congressman.

This voluntarily offered material included:

a. Correspondence and other communications from the Commission to Members of Congress or their staffs, advising a Member with respect to the frankability of a proposed mailing.

b. Correspondence and other communications from Members of the House Commission staff to Members of Congress or their staffs that provide such advice.

c. Correspondence and other communications relating to the franking privilege, between, on the one hand, the House Commission or its staff and, on the other hand, individuals other than Members of Congress or their staff.

d. Internal staff memoranda addressed to the Commission in cases where staff memoranda have been adopted by the Commission as the basis for its final action in (i) rendering advice on the frankability of a proposed mailing, or (ii) adopting policies or regulations of general application with respect to permissible uses of the franking privilege by Members of Congress. [Stipulation and Protective Order Regarding Production of Information and Documents by Certain Employees of the House of Representatives, *Common Cause v. Bailer*, Civil Action No. 1887-73 (D.D.C. March 1, 1976) at 5-6.]

Furthermore, still a different code will be used in place of Members' names in this compilation than in the previous one, and it was:

specifically understood and agreed that Mr. Smiroldo will not provide Plaintiffs with information or access to other materials consisting of (a) internal memoranda that were not adopted by the Commission as the basis for advice or policy decisions by the staff or the Commission, (b) requests for advice by members, except as otherwise provided for above, and (c) either the identity or the code number for the members involved. [*Id.* at 6.]

Finally, the court's order stated that with respect to subpoenas issued by plaintiffs to administrative assistants or aides of all 100 U.S. Senators, which commanded each one to bring with him "all

documents, correspondence, memoranda, and other writings or copies thereof, which relate to or reveal the types of lists, 'codes,' or groupings of names maintained for mailing purpose in the Senate computer since December 18, 1973," in conjunction with each one being deposited at 15-minute intervals from February 18 to 23, 1976, it was understood that counsel for both parties were trying to work out a solution including the directing of one subpoena to a single staff member who would represent all 100 Senators in the furnishing of documents anonymously, and it ordered the proposed procedure as approved, with the court to be advised of the precise procedure agreed upon.

On March 9, 1976, the House passed H. Res. 1082 giving its consent to the House employees to furnish the documents requested in the stipulation.

The Senate passed S. Res. 411 on March 24, 1976, which authorized the preparation of a list showing the codes used by each Senator on work orders for mailings sent under the frank, and authorizing employees to furnish the meaning of such codes.

On April 7, 1976, the 100 administrative assistants moved for a protective order from the court limiting the scope of discovery to the terms of S. Res. 411.

On July 1, 1976, the House of Representatives passed H. Res. 1382 authorizing the House Commission on Congressional Mailing Standards to seek to intervene in the case. The motion to intervene was filed on August 6.

On September 9, an order was filed granting the Commission's motion.

In its answer to the complaint filed by Common Cause, the Commission denied the allegations asserted in each cause of action, contested the courts jurisdiction over the subject matter, attacked the standing of the plaintiffs, answered that the complaint failed to state a claim upon which relief could be granted, and asserted that the plaintiffs had failed to exhaust the administrative remedies available to them.

On September 24, 1976, Judge Pratt, without comment, denied the April 7th motion for a protective order filed by the Senate administrative assistants.

On January 31, 1977, a copy of a letter dated January 21, 1977, from Senator Lee Metcalf to Cornelius Kennedy, the attorney for the Senate employees, was filed with the court. Senator Metcalf was writing as the Chairman of the Senate's Ad Hoc Committee on Legislative Immunity, which is considering the actions to be taken in the *Common Cause v. Bailer* lawsuit. The letter noted the large volume of information which the Senate had already authorized be turned over to Common Cause in July of 1976. Senator Metcalf asserted that categories of names used before the statute went into effect on December 18, 1973, or those in the computer but not used after the statute went into effect, cannot represent any priority use of these categories for political purposes. Furthermore, he alleged, the actual use made of these categories of names supersedes any manuals or instructions in any Senate office, since the actual use would reflect the ultimate decisions with respect to the use of the computer and the categories of names stored therein. Senator Metcalf stated that the information furnished had involved a substan-



tial cost and had resulted in a significant disruption of the work in all 100 Senate offices. He noted that despite the heavy workload of the Senate leadership at the beginning of the 95th Congress, the Senate Democratic Conference had met on January 13, 1973, to discuss this case, and had advised the Ad Hoc Committee that Common Cause had persisted in attempts to go beyond the actual use of the frank as reflected by the information which the Senate had already provided, and Common Cause had resisted efforts by Mr. Kennedy to reach an agreement on the information already supplied by the Senate employees in connection with the proceeding. The Ad Hoc Committee was instructed to study the case further and report its findings to the Senate Democratic Conference no later than March 1, 1977.

Attorneys for the parties appeared at a status call on March 14, 1977 before U.S. Circuit Judge Malcolm R. Wilkey and U.S. District Judge John R. Pratt. During the discussion, Cornelius Kennedy, the attorney for the Senate parties, was asked why the Senate had not yet furnished Common Cause with all of the computer codes promised. Mr. Kennedy replied that they had furnished all the codes they stipulated would be filed, which were the codes used for mass mailings. Judge Wilkey said he understood that all codes would be furnished, not just those that had actually been used for mass mailings since all codes could be used for mass mailings. Common Cause verified that it wanted all codes, not just those that had actually been used. They also said that they wanted the data on mailings for 1972. Mr. Kennedy said that while part of those data was available, the key to producing the data in any useable form was the computer center work order, and these work orders do not exist because they were not kept.

Regarding the letter which Senator Metcalf had filed with the court on January 31, 1977, the following colloquy took place:

Judge WILKEY. And what is the style of this ad hoc committee that issued the 2 volume report [to the Senate on this suit, copies of which Mr. Kennedy provided the court and plaintiffs at this status call]?

You referred to its appointment last March, I think.

Mr. KENNEDY. Last February, actually.

Judge WILKEY. What is the style of it?

Mr. KENNEDY. It is the ad hoc committee on legislative immunity. It achieved that title, I guess, because it was involved specifically in this case.

\* \* \* \* \*

Judge WILKEY. Well, we have read with some interest this 3 page letter of Senator Metcalf as to what has been done, specifically not exactly what has been done, but what hasn't been done, and I am struck by a certain misconception that is in the letter. I think there is a misconception in this letter, and you as a lawyer—Senator Metcalf is a lawyer, he once was.

Mr. KENNEDY. He was a State Supreme Court Justice.

Judge WILKEY. Of the State of Montana.

Judge PRATT. That's right.



Judge WILKEY. There is a certain misconception that the relevance of these matters is to be determined by one of the parties. That's not so. The relevance of these matters is for the Court, after argument by the parties, but the determination of relevance cannot be made in this case, or any other case, by one of the parties. And I think that is a fundamental misconception which should be set straight, because the Court is going to act on the basis that relevance will be determined by the Court, after argument, of course, by the parties.

Thank you, Mr. Kennedy. [Transcript of Status Call of March 14, 1977 at 23-25, *Common Cause v. Bailer*, Civil Action No. 1887-73 (D.D.C.).]

Later in the status call, the following exchange took place:

Judge PRATT. Will you be communicating with your principals between now and the 4th of April, Mr. Kennedy?

Mr. KENNEDY. Very much so, Your Honor.

Judge PRATT. I think you should impress on them the concern of the Court with the present lack of discovery on the part of the Senate, and also the fact that we have not only the subpoena, the stipulation of January 7, 1976, the Court's order incorporating the stipulation, the Court's order of September 24, 1976, having to do with our denial of motions for relief from our March 1st, 1976 order, and that one of these days we are going to have to bite the bullet. And I think the record should show that you filed this committee report in two volumes, entitled "Communication with constituents of codes the Senator's duty to inform the people, the report of the ad hoc committee on legislative immunity, United States Senate, to the Senate Democratic and Republican conferences, dated March 1, 1977."

I assume that is the complete report that Senator Metcalf's committee will be presenting; is that correct?

Mr. KENNEDY. It is the report which they are submitting to the two conferences. I cannot anticipate what action the conferences will take, or whether they will ask for further reports.

Judge PRATT. I see. Thank you, Mr. Kennedy.

Judge WILKEY. Mr. Kennedy, I view this matter, and I am sure Judge Jones does too, this matter of all the code categories have not been produced, code categories which were used or could be used for the frank[ed] mail is interpretation we put on the original subpoena, on the stipulation which you entered, and on two orders, and this cannot long go with the Court's orders and your stipulation is ignored.

Now, that is just about as plain as we can make it at this time. We're going to wait and see what the facts show, but on the facts as they stand now you have a problem.

Mr. KENNEDY. Thank you, Your Honor.

\* \* \* \* \*

[Transcript of Proceedings of March 14, 1977 at 34-35, *Common Cause v. Bailer*, Civil Action No. 1887-73 (D.D.C.).]

On April 1, 1977, plaintiffs filed with the court a list of documents which had not been produced by James Estep, the Manager of the Senate Computer Service and by the 100 Senate administrative assistants. Sought from Mr. Estep was data for 1972 and the codes maintained in the Senate computer for franked mail purposes by each Senator and the number of names in each category. From the 100 administrative assistants the plaintiffs still sought the identity of the categories of names maintained in the Senate computer for franked mail purposes since December 18, 1973, and documents which contained general or specific instruction on the use of the names in the computer for franked mail purposes.

On April 4, 1977, another status call was held. Mr. Kennedy pointed out that neither the Senate nor any of its employees are parties in this case, and that the Senate employees are all subject to Senate Rule 30, providing that no memorial or other paper presented to the Senate shall be withdrawn from its files except by order of the Senate. In addition, he said, these employees are bound by S. Res. 411, 94th Congress, 2d Sess. (March 24, 1976), and the information sought by Common Cause is under the control of the Senate and the individual Senators. Mr. Kennedy reviewed the reasons why the Senate takes the position that the franking privilege is part of the official responsibilities and duties of the Members of the Senate to keep constituents informed. He pointed out that despite this constitutional assertion, the Senate in this action had acted within the judicial framework, appealing court decisions and seeking protective orders, and that the Senate had directed him, with respect to discovery, to work out an arrangement agreeable to the court and the plaintiffs, but if none could be worked out, then the Senate would appeal any decision adverse to its interests. He stated he had earnestly tried to work out what documents would be produced, but quoted counsel for Common Cause as telling him "But when are you going to understand I don't want to work this out with you, stop wasting your time?" [Transcript of Status Call of April 4, 1973, at 10. *Common Cause v. Bailer*, Civil Action No. 1887-73 (D.D.C.).] He also asserted that plaintiffs didn't need this information and alleged that this could be shown by the fact that they had distorted the information they had already received.

Mr. Kennedy also told the court that on April 1, 1977, the Senate had passed Senate Rule 48 prohibiting Senators from abusing the nonfranking data stored in the Senate's computer by using it for franked mail purposes, regardless of whether or not the statute challenged in this action is found unconstitutional. He explained Rule 48 to the court, step by step, and then told the court that the items sought by plaintiffs which they said had not been provided either did not exist, or else, with the consent of the Senate which Mr. Kennedy would seek, they would be provided to the court for *in camera*, inspection, so that the court might rule on their relevancy. Mr. Kennedy said that the reason they were doing this is

that since the Senate and its employees are not parties to the actions they could not confront false implications at trial.

Finally, Mr. Kennedy read a letter from Senator Metcalf, and placed it in the record at the court's request. The letter noted that under the direction of the joint leadership of the Senate, the Ad Hoc Committee on Legislative Immunity had been studying the matters in connection with the lawsuit for over a year, and its report had been adopted by both the Senate Democratic and Republican Conferences and issued as Senate Document No. 95-33 on March 28, 1977. The Ad Hoc Committee concluded that the dissemination of information relating to proposed or enacted legislation, the administration of legislation by the executive, or the review of such legislation by the judiciary are all an integral part of a legislator's function and are indistinguishable from a Senator's legislative activities, and that the distribution of this information is part of his official business and is entitled to be mailed under the frank. The letter declared that the Senate had gone to extraordinary lengths to serve the interests of justice in this action by authorizing and permitting its employees to testify and by supplying voluminous materials to the plaintiffs. However, the Ad Hoc Committee had reviewed the request for additional materials made upon the administrative assistant of every Senator and had determined that there was no connection between the materials sought and the use of the frank by Senate offices. Therefore, the Ad Hoc Committee was not recommending that the Senate authorize the subpoenaed administrative assistants to turn over these materials. The letter concluded:

The Senate cannot simply accede to excessive demands of this kind. Not only do such demands disrupt the operation of the Senate and involve extensive costs, they also intrude without cause into its functions and privileges.

The committee recognizes that there is at present no statute defining the scope of the Senatorial privilege involved here. While there is a body of case law defining the express immunity reserved to the Congress in the Constitution, the Courts have yet to address the privilege of the Houses of Congress deriving from the supremacy of each branch of the government within its own assigned area of Constitutional responsibilities.

Whether the privileges and immunities of the Senate can be properly invoked in the case now before this Court is, of course, for the Courts to decide—just as the Courts will decide all other judicial questions raised, including what information is relevant and necessary.

Until there is a final judicial determination to the contrary, however—and after appeal, if necessary, as to the issues of relevancy and privilege—the committee, with the concurrence of both the Senate Democratic and Republican Conferences, will continue to contest the relevance of the additional materials sought by the plaintiff and to assert the privileges and immunities of the Senate in order to preserve and protect the powers and prerogatives granted and reserved to the Congress by the Constitution.



[Letter from Senator Lee Metcalf to Cornelius B. Kennedy, dated April 4, 1977.]

Mr. Kenneth J. Guido, Jr., Counsel for Common Cause, disputed the assertions of Mr. Kennedy, and asked that the materials sought in the subpoena be turned over to the plaintiffs.

At the conclusion of the status call, the court directed Mr. Kennedy, to submit the materials to the court for *in camera* inspections.

On April 29, 1977, the Senate passed S. Res. 136, 95th Cong., 1st Sess. (1977), which authorized Mr. Kennedy, counsel for the subpoenaed Senate employees, to furnish to the District Court, for *in camera* inspection:

“(1) information on volume of mail for the year 1972 with the identity of the Senators coded, set out in the same fashion as the information previously authorized to be submitted to the court and to the plaintiffs for 1973, 1974, and 1975;

(2) those copies of what are known as computer code counts, identifying the categories of codes maintained in the Senate computer by each Senate office and the number of names in each category, which were retained by the computer Center in 1975, and the computer code count made near the close of 1976 for the Senate offices not included in the 1975 group, in each case with the identity of the Senators coded; \* \* \*”

The resolution further provided that Mr. Kennedy was to furnish from the 100 Senators' administrative assistants:

“[A] form that the identity of the Senator is coded consistent with the manner in which earlier information was submitted in this case, the meaning assigned to such codes to the extent that he may have that information in his possession, as well as such general or specific instructions which he has in his possession with respect to the use of the code categories maintained by that office, \* \* \*”

On May 2, 1977, U.S. District Judge George L. Hart was named to replace Judge William B. Jones on the three-judge District Court.

At a status call on May 25, 1977, Mr. Kennedy was directed to file the requested documents *in camera* by June 15, 1977. The court stated that before it would release any of the information to the plaintiffs it would notify the Senate and give it 60 days to obtain a stay order.

On August 31, 1977, Common Cause filed a notice of taking a deposition, on September 14, 1977, of the National Records Center, Accession and Disposal Branch, General Services Administration. The National Records Center had also been served with a subpoena *duces tecum* commanding the appearance of a representative to be designated by them at such deposition, and further commanding that the representative so designated produce for inspection; (1) copies of all Records Transmittal Receipt Forms which had been transmitted to the National Records Center since January 1, 1972; (2) copies of all Records Reference (Retrieval) Requests which have



been transferred from the National Records Center since January 1, 1972; and (3) all documents, correspondence, memoranda, and other writings, or copies, received by the National Records Center relating to the use by the Senators so designated or their agents and/or employees, of direct mail, the Congressional mailing privilege, and/or direct mailing lists and/or techniques which were transmitted to the National Records Center since January 1, 1972.

On September 2, 1977, the Federal defendants filed a report regarding a meeting held on July 20, 1977, between the Federal defendants, the intervening defendant and the Senate deponents and a subsequent agreement to provide plaintiff with an opportunity to inspect documents of the U.S. Department of Agriculture relating to the Department of Agriculture's farmers' bulletins publications program.

On September 7, 1977, the National Records Center, Accession and Disposal Branch, General Services Administration filed an objection to the production, by September 14, 1977, of the various documents as specified in the subpoena *duces tecum*.

An order was filed on September 23, 1977, directing that the material submitted to the court for *in camera* inspection as authorized by S. Res. 136, 95th Cong., 1st Sess. (1977), be retained by the court for 60 days pending appeal and that, if no appeal has been noted within 60 days, the material be released to Common Cause.

Notices of appeal to the Court of Appeals for the District of Columbia Circuit and to the U.S. Supreme Court by Peter Stavrinos and the other Senate employees, nonparty deponents, of the order, were filed on October 21, 1977.

Plaintiffs moved the court on October 26, 1977, to compel the 100 Senate Administrative Assistants to produce documents.

On November 15, 1977, the Senate agreed to S. Res. 325, 95th Congress, 1st Sess. (1977) which authorized the counsel for the subpoenaed Senate employees to furnish the material for use in the proceeding without restriction to *in camera* use, but subject to the protective provisions in the previously approved stipulation. The resolution also authorized the counsel for the subpoenaed Senate employees to file for leave to intervene on behalf of the Senate in order to protect and defend the duties, responsibilities, rights and privileges of the Senate under Article I of the Constitution.

A memorandum in opposition to plaintiffs' motion to compel the 100 Senate Administrative Assistants to produce documents was filed on November 17, 1977 by the 100 Senate Administrative Assistants.

On November 29, 1977 the Senate employee deponents filed a motion to withdraw their notice of appeal. On the same day, an order was filed granting the motion to withdraw the separate notices of appeal to the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit.

The motion of plaintiffs to compel the 100 Senate Administrative Assistants to produce documents was argued and granted on November 29, 1977 and an order granting the motion was filed on December 19, 1977.

*Status.*—The case is pending before the three-judge court in the U.S. District Court for the District of Columbia.

The full texts of the orders of September 23, 1977 and December 23, 1977 are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

The full text of the court's "Memorandum and Order" of July 30, 1975, the "Stipulation and Protective Order Regarding Production of Information and Documents By Certain Employees of the House of Representatives," filed on March 1, 1976, and the "Order" of the court filed on March 1, 1976, were printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1976.

The full text of the memorandum and order of February 10, 1975, was printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1975.

**Lewis v. Chisholm** (New Case)

Civil Action No. 78—0196 (D.D.C.)

**Brief.**—O'Dell Lewis, a former legislative assistant to Representative Shirley Chisholm, filed this suit along with Lewis' ex-wife Judy Ann Lewis in the United States District Court for the District of Columbia on February 3, 1978. Named as defendants are Congresswoman Shirley Chisholm; Carolyn J. Smith, Representative Chisholm's administrative assistant; Muriel Morrissey, chief legislative assistant to Congresswoman Chisholm; and Colleen O'Connor, press secretary to Representative Chisholm during the period of Mr. Lewis' employment with Congresswoman Chisholm.

The complaint states five causes of action. The first cause of action is a breach of contract claim charging defendants with employment discrimination based on sex in violation of the House Fair Employment Practices Agreement by discharging Lewis because of his sex, the second cause of action alleges employment discrimination based on sex in violation of the Fifth Amendment to the Constitution. The third cause of action is one of injurious falsehood, claiming that Ms. Smith submitted a false statement to the U.S. Department of Labor to the detriment of Mr. and Mrs. Lewis. The fourth cause of action alleges interference with a prospective advantage and defamation on the basis of a letter allegedly sent by Representative Chisholm to a prospective employer of Mr. Lewis. The final cause of action is a claim of libel and slander based on statements allegedly made to a reporter for the *New York Post* and printed in that newspaper.

The complaint seeks \$50,000 in compensatory damages, \$500,000 in punitive damages and an order prohibiting defendants from making statements concerning the plaintiffs.

Defendants Chisholm, Smith and O'Connor filed an answer on February 23, 1978. Included in the answer was a counterclaim by defendant Smith for compensatory and punitive damages in the amount of \$250,000. The counterclaim alleges that Mr. Lewis' claim is spurious, malicious and brought in bad faith solely for the purpose of harassing defendant Smith.

Defendant Morrissey also filed an answer on February 27, 1978.

**Status.**—The case is pending in the District Court.



## VI. DISPUTED ELECTIONS

### *Moreau v. Tonry*

No. 76-3290 (E.D. La.)

*Brief.*—On October 2, 1976, a runoff primary was held for the Democratic nomination for the U.S. House of Representatives for the First Congressional District of Louisiana. The apparent winner of the runoff, Richard Tonry, then defeated the Republican candidate in the general election on November 2, 1976, and was seated as a Member of the 95th Congress on January 4, 1977.

From the runoff primary election three civil actions have arisen.

In the first action, James Moreau, the other candidate in the runoff primary, brought suit in the State District Court pursuant to the Louisiana election statute (La. R.S. 18:364). [*Moreau v. Tonry*, No. 28-837 (25th Jud. Dist. Ct. of Parish of St. Bernard, La. Oct. 15, 1976).] Mr. Moreau asserted that but for fraud and irregularities he, rather than Mr. Tonry, would have been the nominee and in fact, by reason of the legal votes cast in the race, he was the nominee. The State District Court found no basis for voiding the election, but the Louisiana Court of Appeals, sitting *en banc*, decided to set aside the election. [*Moreau v. Tonry*, No. 8222 (4th Cir. of La. Oct. 21, 1976).] The State Court of Appeals decision was subsequently overturned by the Louisiana Supreme Court which reinstated the judgment of the District Court dismissing the election contest. [*Moreau v. Tonry*, No. 58791 (Supreme Court of Louisiana Oct. 25, 1976).]

The Louisiana Supreme Court's decision was appealed to the U.S. Supreme Court which, on March 21, 1977, dismissed the appeal for want of a properly presented Federal question. [*Moreau v. Tonry*, 45 U.S.L.W. 3646 (U.S. Mar. 21, 1977).]

As the election contest was progressing through the Louisiana State courts, Mr. Moreau filed suit as an elector in the U.S. District Court for the Eastern District of Louisiana for deprivation of rights under the Fourteenth Amendment to the Constitution and the Civil Rights Act of 1965. [*Moreau v. Tonry*, No. 76-3087) ED. La. Oct. 7, 1976).]

Mr. Moreau sought to enjoin the Louisiana Secretary of State from recognizing Mr. Tonry as the Democratic nominee and from conducting a general election on November 2, 1976, for the 1st District House seat. The suit was dismissed "for failure to state a claim upon which relief can be granted and/or for lack of jurisdiction." [Appellants' Brief at 3, *Moreau v. Tonry*, No. 74-4230 (5th Cir.).] No appeal was taken.

On October 26, 1976, Mr. Moreau and a group of his supporters filed, in the Federal District Court for the Eastern District of Louisiana, an action for deprivation of rights under Article I of the United States Constitution and the Fourteenth Amendment of the Constitution. [*Moreau v. Tonry*, No. 76-3290 (ED. La. Oct. 26, 1976).]



The defendants, including Mr. Tonry, filed motions to dismiss asserting, *inter alia*, "that the action was either *res judicata* or collaterally estopped because of the dismissal of plaintiff's case[s] in State and Federal court[s]." [*Id.* at 4.] The District Court refused to dismiss, holding that the doctrine of *res judicata* was not applicable and that the action was collaterally estopped as to only part of the asserted irregularities. The defendants appealed.

As articulated by the appellants the issues presented for review by the 5th Circuit Court of Appeals were:

1. Whether the District Court has jurisdiction over election contest suits concerning elections for United States Representatives to Congress brought by electors when a State contest remedy is provided and finally adjudicated;

2. Whether the action is *res judicata* or is collaterally estopped because of the disposition of the issues in Louisiana State courts; and the disposition of plaintiff's previous action in Federal court;

3. Whether laches bars the assertion of a Federal cause of action to annul primary election brought so near the date of the general election that neither a new election or appointment of a nominee under State law is an available remedy;

4. Whether mootness bars this action, in that after the election the House of Representatives has the power to decide whom it will seat. [*Id.* at 1.]

Oral argument was held in the action before the 5th Circuit Court of Appeals on January 26, 1977.

On April 13, 1977, the 25th Judicial District Court of the Parish of St. Bernard reopened its case. On April 21, 1977, Judge Melvin A. Shortess vacated his judgment of October 15, 1976. Finding that "but for" the fraud perpetrated upon the court by the witnesses who testified the action would not have been dismissed, Judge Shortess concluded that his original decision had to be vacated. Because of the fraud which he found, he also concluded that:

As a consequence, Tonry rather than Moreau became the Democratic nominee, and Tonry now sits in Congress. The language of Article 1, Section 5, of the U.S. Constitution makes Congress the sole judge of the qualification of its members. Congress must now decide. Hopefully, it will bear in mind that this court, for all of the reasons set forth above, does now annul and set aside its prior judgment of October 15, 1976. [*Moreau v. Tonry*, No. 29-542 (25th Jud. Dist. Ct. of Parish of St. Bernard, La. April 21, 1977); Slip Opinion at 17.]

On May 4, 1977, Mr. Tonry resigned his seat in the U.S. House of Representatives.

A special panel of the Committee on House Administration of the U.S. House of Representatives had also been investigating the alleged vote fraud. With Mr. Tonry's resignation, the panel dropped its inquiry, although it did issue a report in the form of a committee print on June 2, 1977.

On June 9, 1977, the U.S. Court of Appeals for the 5th Circuit announced its decision *per curiam*. Noting that Mr. Tonry's resignation mooted the appellee's chief requests to set aside the results

of the Democratic primary, the court concluded that nothing remained of the action for which the court could grant the interlocutory appeal. The court thus vacated the decision of the District Court allowing the appeal and remanded the action back to the District Court for consideration of the mootness of the entire action or for such further proceedings as the District Court might require.

*Status.*—The Federal action (76-3290) is pending before the U.S. District Court for the Eastern District of Louisiana.

The complete text of the April 21, 1977 decision of the 25th Judicial District Court for the Parish of St. Bernard is printed in the "Decisions" section of the *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

The complete text of the *per curiam* opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

The complete texts of the opinions of the Supreme Court of Louisiana, the Louisiana 4th Circuit Court of Appeals, and the 25th Judicial District Court for the Parish of St. Bernard, are printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.



## VII. OTHER ACTIONS INVOLVING MEMBERS IN A REPRESENTATIVE CAPACITY

### *Dellums v. Powell*

Nos. 75-1974, 75-1975, 75-2117, 76-1418 and 76-1419 (D.C. Cir.)  
and No. 2271-71 (D.D.C.)

and,

### *Powell v. Dellums*

No. 77-955 (U.S. Supreme Court)

and,

### *Wilson v. Dellums*

No. 77-1129 (U.S. Supreme Court)

*Brief.*—This action for declaratory and injunctive relief and for damages, brought in the U.S. District Court for the District of Columbia on November 11, 1971, arises out of the arrest of some 1,200 persons assembled on the steps of the House of Representatives at the Capitol Building on May 5, 1971.

Representative Ronald V. Dellums, a plaintiff, brought the action as an individual for violation of his constitutional rights and for interference with the discharge of his constitutional duties as a Member of Congress. The other plaintiffs, all arrested demonstrators, sued individually and as members of their class, seeking damages, expungement of arrest records and destruction of illegally obtained fingerprints and photographs.

Defendants named in the complaint included the Chief of the Capitol Police James M. Powell, the Chief of the Metropolitan Police Department, the District of Columbia, then-U.S. Attorney General John Mitchell, and then-Deputy Attorney General Richard Kleindienst.

Numerous pretrial motions were filed on behalf of the parties to the action resulting in a number of rulings by U.S. District Judge William B. Bryant, in which he denied plaintiffs' motion for a preliminary injunction, granted plaintiffs' motion to maintain the action as a class action and required defendants to supply to plaintiffs the names and addresses of the persons arrested on the Capitol steps on May 5, 1971, in order that notices of the class action could be sent to them, and permitted extensive discovery through the use of interrogatories.

On December 2, 1974, defendant Mitchell was granted a severance because of his involvement with other judicial proceedings.

On January 16, 1975, a \$12 million judgment against the defendants (other than Mr. Mitchell and Mr. Kleindienst) for false arrest and infringement of basic rights under the First, Fourth and Eighth Amendments to the Constitution, was awarded to the 1,200 antiwar demonstrators. Representative Dellums was awarded \$7,500 for deprivation of his rights of free speech under the First



Amendment. [*Dellums v. Powell*, Civil Action No. 2271-71 (D.D.C. 1975).]

Appeals were filed by the defendants on October 1, 1975 (Nos. 75-1974 and 75-1975). On October 22, 1975, plaintiffs filed an appeal (No. 75-2117) from an October 20, 1975 final judgment by the District Court dismissing defendant Kleindienst as a party to the action.

On March 4, 1976, the District Court reinstated into the class three plaintiffs who had been dismissed from the suit as original plaintiffs. Defendants immediately appealed this decision (Nos. 76-1418 and 76-1419).

All five cases were consolidated for purposes of appeal on June 3, 1976, and oral argument was heard by the Appeals Court on January 14, 1977.

Plaintiffs, meanwhile, had begun to proceed with their action against Mr. Mitchell. Before the severance of the trial on December 2, 1974, a subpoena *duces tecum* had been served upon Philip Buchen, counsel to then-President Ford, demanding production of "all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971, at which 'May Day' demonstrations \* \* \* were discussed." The subpoena was served in October 1974. Mr. Buchen filed a motion to quash the subpoena, stating that although he had actual physical control over the tapes, he was not their custodian. Alternatively he argued that the material sought was not relevant to the case. The District Court denied his motion on November 14, 1974, and ordered production of the material. Counsel for former President Nixon then filed a motion for a stay of the November 14 order and also filed a motion to quash the subpoena. The motion for a stay and Mr. Mitchell's motion for severance were both granted on December 2, 1974.

No action was taken on the subpoena until the plaintiffs began making preparations to proceed with their case against Mr. Mitchell. On February 17, 1976, plaintiffs filed a memorandum in opposition to Mr. Nixon's motion to quash. The District Court denied Mr. Nixon's motion to quash on March 10, 1976, lifted its stay order of December 2, 1974, and ordered Mr. Buchen to advise the court of the time necessary for compliance with the subpoena. Mr. Nixon immediately appealed, and the Court of Appeals stayed the District Court's order pending appeal.

The Appeals Court issued its opinion on the Nixon appeal on January 28, 1977. The court rejected "Mr. Nixon's contention that a formal claim of privilege based on the generalized interest of Presidential confidentiality, without more, works an absolute bar to discovery of Presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought." [*Dellums v. Powell*, No. 76-1336 (D.C. Cir. Jan. 28, 1977); Slip Opinion at 61.] The court concluded that the privilege is only presumptive, not absolute, requiring a balancing approach weighing the interests to be protected against the necessity for production. The Appeals Court affirmed the District Court's finding that plaintiffs had made a showing sufficient to overcome the claim of privilege. However, the Appeals Court ruled that the District Court erred in failing to provide adequate protections for Mr. Nixon's personal privacy interests in the subpoenaed materials, and it ordered the District

Court to take certain steps to insure that privacy. The court ordered the District Court's memorandum order remanded for modification and ruled that the subpoena may thereafter issue.

Judge MacKinnon, in a separate opinion concurring in part and dissenting in part, said that Presidential privilege should protect former Presidents to the same extent it protects the incumbent because the privilege belongs to the office.

On March 11, 1977, Mr. Nixon filed a petition for rehearing *en banc*.

On April 14, 1977, the petition for rehearing was denied. Mr. Nixon then moved for a stay of mandate, which the Court of Appeals granted until at least 30 days after a decision by the U.S. Supreme Court in *Nixon v. Administrator of General Services*.

On June 28, 1977, the U.S. Supreme Court handed down its decision in *Nixon v. Administrator of General Services*.

On July 13, 1977, Mr. Nixon filed a petition for a writ of *certiorari* with the U.S. Supreme Court. [*Nixon v. Dellums*, No. 77-81 (U.S. Supreme Court).]

The Court of Appeals issued its opinions in the consolidated cases on August 4, 1977. For its own convenience, the court wrote separate opinions in each case.

In the appeals of James M. Powell, the Chief of the United States Capitol Police (No. 75-1974), and the District of Columbia and its chief of police at that time, Jerry V. Wilson, (No. 74-1975), the court (1) affirmed the jury's verdict in all respects on its findings that appellants were liable for false arrest and false imprisonment and that the lower court had not incorrectly denied a directed verdict or a new trial to the defendants on those counts, (2) vacated the judgment of liability and damages for cruel and unusual punishment as being duplicative and contrary to law, since the jury had already considered these matters in awarding damages for false arrest and false imprisonment, (3) affirmed liability as to violation of First Amendment rights, but ordered a new trial as to damages, finding that the \$7,500 awarded to each member of the class was in these circumstances, "totally out of proportion to any harm that has been suffered \* \* \*" [*Dellums v. Powell*, No. 75-1974 (D.C. Cir. August 4, 1977); Slip Opinion at 53] and (4) vacated the judgment on liability for malicious prosecution and ordered a new trial on this charge as to Mr. Powell only.

Regarding the awarding of \$7,500 to Representative Dellums for deprivation of his First Amendment rights, the court agreed with Representative Dellums that he had suffered a First Amendment wrong when his listeners were arrested. The court concluded that damages could be awarded for loss of these rights, but just as it concluded that the damages awarded to the class for loss of its First Amendment rights were excessive, it also found the \$7,500 awarded to Representative Dellums to be excessive. It therefore affirmed the jury's findings that the defendants were liable to Representative Dellums for his loss of First Amendment rights, but ordered a new trial as to damages.

In the appeals of the orders reinstating into the class the three plaintiffs who had been dismissed from the suit as original plaintiffs (Nos. 76-1418 and 76-1419), the Appeals Court affirmed the

decision of the trial judge reinstating two of the plaintiffs, but ruled that the third should not have been reinstated.

In all of these August 4, 1977 decisions of the Court of Appeals Judge Edward A. Tamm dissented. Judge Tamm was of the opinion that had the trial court taken proper judicial notice of the events preceding the arrests, the actions of the police would have been held immune from civil liability as a matter of law.

The court also unanimously affirmed the District Court's dismissal of Mr. Kleindienst from the suit.

On August 11, 1977, appellants in the consolidated cases filed a motion for an extension of time to file a petition for rehearing.

On September 1, 1977, a *per curiam* order was filed in the Court of Appeals granting the motions of the District of Columbia appellants in numbers 75-1975 and 76-1419 to file petitions for rehearing and extending to September 19, 1977, the time within which the District of Columbia appellants might file petitions for rehearing and/or suggestions for rehearing *en banc* in numbers 75-1975 and 76-1419.

On October 3, 1977, Mr. Nixon's petition for writ of *certiorari* on his appeal was denied by the United States Supreme Court.

On October 19, 1977, the District of Columbia appellants filed a petition for rehearing *en banc* in the Court of Appeals.

On October 21, 1977, the U.S. Supreme Court extended the time for defendant Powell to file a petition for writ of *certiorari* to January 1, 1978.

On November 14, 1977, a *per curiam* order was filed in the Court of Appeals denying the petitions for rehearing filed by both appellees Ronald V. Dellums *et al.* and appellants District of Columbia, *et al.*, on the same day, a *per curiam* order *en banc* was also filed in the Court of Appeals denying appellants' suggestion for a rehearing *en banc*.

Mr. Powell filed a petition for writ of *certiorari* with the U.S. Supreme Court on January 3, 1978.

Mr. Wilson filed a petition for writ of *certiorari* with the U.S. Supreme Court on February 10, 1978.

Respondents moved to recuse Mr. Justice Blackmun in both 77-955 and 77-1129 on May 9, 1978. As the basis for the motion, the respondents cite statements allegedly made by Mr. Justice Blackmun at a Legal Aid Society ceremony in New York City on March 8, 1976. According to respondents' motion, Mr. Justice Blackmun publicly expressed the view that the May Day demonstrators were "trying to take over the government" and expressly stated his approval of the police handling of the demonstrations.

*Status.*—New trials are pending in the District Court as to damages and as to the malicious prosecution complaint against defendant Powell.

The petitions for writ of *certiorari* are pending before the United States Supreme Court.

The complete text of the opinions of the Court of Appeals are printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977, as follows: No. 75-1974 [Mr. Wilson] at 711; No. 75-1975 [Mr. Powell and the District of Columbia] at 815; and Nos. 76-1418 and 76-1419 [reinstated plaintiffs] at 845.



The complete text of the opinion of the Court of Appeals in *Dellums v. Powell*, No. 77-1336 [Nixon appeal] is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 1, April 15, 1977.

***Sportservice Corp. v. Steiger***

Civil Action No. C286651 (Superior Court, State of Arizona for Maricopa County)

**Brief.**—On January 25, 1974, Sportservice Corporation and its subsidiaries, which are engaged in various businesses including horse racing, dog racing, and businesses identified with those activities, as well as the operation of food and beverage concessions, filed suit against then-Representative Sam Steiger, one of his former aides, and others alleging a conspiracy to damage plaintiff's business activities for defendant's personal benefit. The complaint asks \$1 million in damages.

Among other charges, Sportservice alleged that statements made by Representative Steiger and dissemination by him of material to certain publications were part of the conspiracy.

Representative Steiger, in his answer, denied any conspiracy, responded that all the statements he had made and the material he had furnished were true, and claimed that all acts done or performed were in his capacity as a Member of Congress in furtherance of his official duties. As such, Representative Steiger claimed that they were protected by the "doctrines of legislative privilege and legislative immunity." As for the statements made by him and alleged by Sportservice to be defamatory, Representative Steiger asserted that his statements were true, made in good faith in the belief that they were true, and in any event, privileged as statements made in the public interest involving matters of public concern.

Representative Steiger's answer to Sportservice's complaint contained a counterclaim alleging that Sportservice was engaging in an effort to defame him and to damage his reputation individually and as a Member of Congress. Representative Steiger's counterclaim seeks \$2 million in damages.

During the course of the proceedings, the trial court ordered Representative Steiger's former aide to answer questions put to him in a discovery deposition. Representative Steiger asserted Speech or Debate clause immunity to prevent the aide from responding. Sportservice then sought a court order to require the aide to answer. Such an order was issued by the trial court, but Representative Steiger appealed. The matter came before the Arizona Supreme Court [*Steiger v. The Superior Court of the State of Arizona for Maricopa County*, 536 P.2d 689 (Ariz. 1975)] and was decided on June 4, 1975.

Before the State Supreme Court, Representative Steiger again asserted that the actions complained of by Sportservice were carried out in his official capacity and that Speech or Debate clause immunity was a bar to inquiry into his legislative activities.

The court held that while activities that are clearly related to the legislative process are immune from inquiry, even when general criminal statutes might otherwise apply, Speech or Debate clause immunity does not shield everything related to a Congress-



man's office. Only acts done in the process of enacting legislation are protected. While Representative Steiger had asserted that the acts which were to have been the subject matter of the deposition were part of an investigation he was conducting, the court noted that there was no showing that the investigation was related to any pending Congressional inquiry or legislation. The court also noted that more than 1 year after the acts occurred, Representative Steiger introduced a bill to provide criminal penalties for fixing certain horse or dog races. While the court said it was arguable that the impetus for the legislative proposal may have resulted from the investigation and as such was related to the legislative process, it refused to accept that such a connection was sufficient to bring the acts within the protection of Speech or Debate clause immunity.

*Status.*—A trial on the merits is pending in the Arizona State court system.

The decision of the Arizona Supreme Court in *Steiger v. The Superior Court of the State of Arizona for Maricopa County* is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, August 15, 1975.

### **Reuss v. Balles**

No. 77-1012 (D.C. Cir.)

*Brief.*—Representative Henry Reuss brought this action (in a complaint filed on June 21, 1976, and in an amended complaint filed on July 7, 1976) against the individual members of the Federal Open Market Committee (hereinafter "FOMC") who are not members of the Board of Governors of the Federal Reserve System, and against the 12 Federal Reserve Banks.

The individual defendants are all presidents or first vice presidents of the Federal Reserve Banks, each of whom was appointed as an officer by his Bank's board of directors, with approval of the Board of Governors of the Federal Reserve System. Under § 12A(a) of the Federal Reserve Act (12 U.S.C. § 326(a)), the FOMC consists of the seven members of the Board of Governors of the Federal Reserve System, plus five others (and their alternates) selected by the boards of directors of the Federal Reserve Banks, who must be either presidents or first vice presidents of said Banks. Each board of directors of a Bank consists of nine members, three of whom are chosen by the Board of Governors of the Federal Reserve System and six of whom are chosen by the commercial banks who are the stockholders of said Bank.

Representative Reuss states that he is "a Member of the House of Representatives and is Chairman of the Committee on Banking, Currency and Housing, which pursuant to Rule X.1(d) of the Rules of the House of Representatives, has jurisdiction of legislative matters relating, *inter alia*, to banks and banking, Federal monetary policy, money and credit, valuation and revaluation of the dollar, and international finance. The plaintiff is also Chairman of the Subcommittee on International Economics of the Joint Economic Committee established by the Employment Act of 1946 (15 U.S.C. Chapter 21)." He also states that he is the owner of certain marketable bonds whose aggregate cost, aggregate marketable value, and aggregate face value are in excess of \$20,000. The complaint states

that the FOMC makes decisions to buy or sell United States Government securities and the currencies of foreign governments, which decisions are then carried out by the Federal Reserve Banks, and that these purchases or sales have a substantial effect on the value of foreign currencies relative to the currency of the United States, and upon domestic bank reserves, bank credit, money supply, interest rates, overall credit conditions, economic activity, jobs, and prices. It states that the five defendant members of the FOMC have the same vote as the seven who are members of the Board of Governors of the Federal Reserve System, and that they exercise substantial power in the formulation of the decisions on open market policy.

Representative Reuss alleges that the method of selection of the five defendant members and their alternates violates Article II, Section 2 (the Appointments Clause) of the Constitution because such members have not been appointed officers of the United States in accordance with the procedures outlined therein. He alleges that by voting on the FOMC they create for themselves *de facto* offices of the United States, thereby diminishing or usurping his legislative functions, both as a Member of the House and as Chairman of its Committee on Banking, Currency and Housing. He alleges he is affected in participating in the exercise of the following powers of Congress:

(a) Regulating the value of money and foreign exchange under Article I, Section 8, clause 5 of the Constitution.

(b) Providing for offices under the United States not otherwise provided for by the Constitution; and establishing the qualifications therefor, prescribing the duties and compensation thereof, and providing for the terms of office and grounds for removal.

(c) Regulating interstate and foreign commerce.

(d) Borrowing money on the credit of the United States.

(e) Participating in the process of selection of officers of the United States as provided in Article II, Section 2, of the Constitution through negotiation with representatives of the Senate on issues and nominees in the context of the overall functioning of the legislative process in the Congress of the United States.

He also alleges that the individual defendants can substantially and adversely affect the value of his property, thereby depriving him of property without due process, by increasing or decreasing interest rates on Government securities and by affecting the availability of money. The complaint asserts that in carrying out the orders of the FOMC, which are made by the allegedly unconstitutional participation of the defendant individuals, the defendant banks regulate the value of money and of foreign currency, thereby interfering with plaintiff's legislative functions under Article I, Section 8, clause 5, and that these actions may also deprive him of property to the extent of more than \$10,000 without due process of law.

The suit asks that the defendant individuals and their successors be permanently enjoined from serving as members of alternate members of the FOMC, that defendant banks be permanently enjoined from complying with any FOMC decisions made while any of

these individuals sit as members of it, and that the court render a judgment declaring void for repugnance to Article II, Section 2, clause 2 of the Constitution, such parts of section 12A(a) of the Federal Reserve Act as provide for the selection of members and alternates of the FOMC by the boards of directors of the Federal Reserve Banks.

Also, on June 21, 1976, Representative Reuss made application for a three-judge court to hear the case pursuant to 28 U.S.C. § 2882.

Defendants filed an opposition to the convening of a three-judge court and a motion to dismiss on July 30, 1976. The motion to dismiss asserted that Representative Reuss lacked standing to sue, both as a Member of the House of Representatives and as an individual owner of securities.

Representative Reuss filed a motion on October 1 to amend his complaint to join the FOMC as a party defendant.

Oral argument on all motions was held on November 30, 1976.

In a memorandum opinion issued December 22, 1976, U.S. District Judge Barrington D. Parker granted defendants' motion to dismiss the complaint. The court held that Representative Reuss lacked standing to bring the suit either as a Congressman or as a bondholder.

Each of Representative Reuss' allegations of injury was considered by the court. As a Congressman, Representative Reuss alleged injury in that the Reserve Bank's representatives were not properly designated as "inferior officers" and they therefore escaped the reach of the impeachment power. The court stated that since there was no specific allegation of wrongdoing, the claim was "remote, conjectural and insufficient." [*Reuss v. Balles*, Civil Action No. 76-1142 (D.D.C. 1976); Slip Opinion at 12.] The court found that his argument that because these Reserve Bank members are not inferior officers of the United States that any delegation of Congressional authority to them is improper and thereby injures him was also without merit. The majority of the FOMC are clearly officers of the United States, said the court, and the other members had to be approved by the Board of Governors of the Federal Reserve, so it could not be argued that the FOMC was a private agency and the delegation of authority was improper. The court stated that Representative Reuss had also failed to show injury in fact in his assertion that he was harmed in his power to affect the confirmation process through negotiation with Members of the Senate, since it is the Senate, and not the House of Representatives, which confirms Presidential appointments made pursuant to the Appointments Clause.

Finally, the court said service on the FOMC by the Reserve Bank members in no way affected Congressman Reuss' ability to perform his legislative duties because he could introduce legislation at any time to overrule the policies or the regulations of the FOMC. As to plaintiff's standing as a bondholder, the court stated that "[a]t best the plaintiff's contentions are generalized concerns of the public, and therefore the alleged injury is abstract and speculative." [Slip Opinion at 14-15.]



Representative Reuss filed a notice of appeal on December 23, 1976, and on January 7, 1977, he filed a motion to expedite the appeal.

On March 11, 1977, the Court of Appeals denied the motion to expedite the appeal.

The appeal was argued on December 5, 1977.

*Status.*—The case is pending before the United States Court of Appeals for the District of Columbia Circuit.

The full text of the District Court's memorandum opinion is printed in the "Decisions" section of the report of *Court Proceedings and Actions of Vital Interest to the Congress*, December 1976.

### ***United States v. Hastings***

Civil Action No. 77-0511 (D.D.C.)

*Brief.*—This action filed on March 22, 1977, seeks to recover from former Representative James F. Hastings certain funds which were paid out while the defendant was serving in the United States House of Representatives. The complaint alleges that from January 3, 1969, to January 20, 1976, while serving in the House, Mr. Hastings had placed on his personal staff payroll several persons who then returned part of their salaries directly to him or to his personal accounts for the purchase or payment of personal goods or services for Mr. Hastings. The complaint also alleges that district office space was rented from the defendant's brother whose insurance agency also had offices in the building, and that personnel on the defendant's staff payroll in that office were also employed by the insurance agency on a full-time basis. The complaint further asserts that the rent and salaries were used to defray the costs and expenses of the insurance company.

The first cause of action states that the defendant has breached his fiduciary duty to the United States and asks for the imposition of a constructive trust or a trust *ex maleficio* upon all of defendant's assets and property and all profits, earnings, income, and benefits arising from the alleged unlawful conduct, with the proceeds to be used for the benefit of the plaintiff as beneficiary. The second cause of action asserts that plaintiff paid these moneys out of mistake of fact, thinking that they were being paid to these people for work actually done, and seeks from defendant \$50,000. The third cause of action is based on the False Claims Act, 31 U.S.C. §§ 231-235, stating that the defendant knowingly submitted false, fictitious, or fraudulent statements with the finance officer of the House, with the intent of defrauding the United States, and asks for double the plaintiff's damages, which are claimed to be over \$30,000, and for the statutory forfeiture of \$2,000 for each violation of the act.

Mr. Hastings filed an answer on April 25, 1977, in which he claimed, among his defenses, that the court lacked jurisdiction over all allegations relating to two of the former employees because the right of action against them arose more than 6 years ago, and the action was therefore barred by the provisions of the False Claims Act. Mr. Hastings also asserted that the first and second cause of action relating to these two employees derived from the allegation of making a false claim for which the False Claims Act was the exclusive remedy, and therefore these actions were also barred. He



claimed that 31 U.S.C. § 235 was more than just a statute of limitations—it was also a jurisdictional bar. As to the allegations relating to another employee, Mr. Hastings, without admitting or denying the allegations, demanded strict proof. Regarding the other employees and the district rental payments, Mr. Hastings, denied all allegations.

On June 24, 1977, the Government filed a motion for partial summary judgment in the amount of \$12,406.19, which they asked the court to double under the False Claims Act, plus eight \$2,000 forfeitures pursuant to the Act. The Government asserted that Mr. Hastings is collaterally estopped by his prior criminal conviction from contesting certain issues relevant to the civil proceedings, and that the United States is entitled to summary judgment not only under the False Claims Act, but also under common law principles calling for an accounting for moneys paid in breach of a fiduciary duty and for moneys paid by mistake.

August 5, 1977, defendant filed an opposition to the Government's motion for partial summary judgment, on grounds that the Government is entitled neither to forfeiture nor to consideration of its common law remedies.

On September 30, 1977, the District Court issued an order granting the Government's motion for partial summary judgment ordering defendant to pay \$40,812.38 under the False Claims Act and denying the Government's request for a constructive trust and other common law relief.

In a memorandum opinion which accompanied the order, Judge Richey noted that, since the defendant did not contest the liability issue, the only issue involved in the motion for partial summary judgment was that of the extent of the relief granted. In regard to the relief available to the Government, Judge Richey stated:

Under the False Claims Act, the United States is entitled to collect \$2,000 for each false "claim" and double the amount of the damages which were sustained. 31 U.S.C. § 231. In this case, the United States claims that it is entitled to \$2,000 for each of the eight payroll authorization forms. Defendant responds that the plaintiff is only entitled to \$2,000 for each of the two employees for whom the allowance forms had been submitted. The Court finds that the payroll authorization forms are "claims" under the statute and, therefore, the United States is entitled to eight forfeitures of \$2,000 each. [Slip Opinion at 6.]

In reaching this conclusion, Judge Richey relied upon the opinion of the U.S. Supreme Court in *United States v. Bornstein*, 423 U.S. 303 (1976), a case which elaborated the method whereby the number of forfeitures should be counted in the context of a False Claims Act allegation against a subcontractor. Judge Richey drew an analogy between the facts in *United States v. Bornstein* and the present case, stating that defendant Hastings was similar to a "prime contractor" who hired employees as "subcontractors" and that the number of forfeitures should be the number of "individual false payment demands", (i.e. the number of payroll authorization forms submitted by the defendant) and not the number of "subcontractors" (i.e. the number of employees hired). The opinion also

stated that this conclusion was supported by the language of the statute.

The statute provides that the \$2,000 forfeiture be paid for doing "any" of the acts prohibited by § 5438 of the Revised Statutes. *United States v. Hess*, 317 U.S. 537, 552 (1943). Section 5438 is the direct antecedent of section 1001 of the present criminal code. *United States v. Bramblett*, 348 U.S. 503, 504 (1955). Thus, the statute provides for the award of a forfeiture for every act in violation of section 1001. Defendant Hastings has been convicted of eight such violations. Accordingly, the defendant will be required to pay eight forfeitures of \$2,000—one for each false claim made upon the United States. [Slip Opinion at 8.]

The opinion held the legislative intent behind the Act to be to provide a complete remedy for fraudulent claims against the United States and therefore plaintiff's request for imposition of a constructive trust and other common law relief was denied.

**Status.**—A stipulated dismissal with prejudice of the remaining claims was approved by Judge Richey on January 25, 1978.

The Memorandum Opinion of the District Court appears in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

### ***United States v. Podell***

Civil Action No. 77-6107 (2d Cir.)

**Brief.**—On October 1, 1974, then-Representative Bertram L. Podell entered a plea of guilty to 2 counts of a 10-count indictment charging him with conspiratorial and substantive violations of 18 U.S.C. § 203(a). The indictment charged that while serving as a Member of Congress, Mr. Podell appeared before the Civil Aeronautics Board and the Federal Aviation Administration and sought favorable treatment of an application for a new route for a small Florida-based airline, and that he was paid \$41,350 for his services. Mr. Podell was fined \$5,000 and was sentenced to a 2-year imprisonment with 18 months of the sentence suspended. [See the brief of *United States v. Podell*, Criminal Action No. 73 CR 675 (S.D.N.Y. October 1, 1974) in the report of *Court Proceedings and Actions of Vital Interest to the Congress*, April 15, 1975.]

On January 30, 1976, the United States filed a civil suit against Mr. Podell under 28 U.S.C. § 1345, seeking to recover the \$41,350 which he allegedly was paid for representing the airline before the agencies.

In his answer, filed on May 20, 1976, Mr. Podell specifically denied each allegation in the complaint and further argued that prosecution was barred by the statute of limitations.

The Government filed a motion for summary judgment on February 22, 1977, to which Mr. Podell filed his opposition on April 5th. On May 30, 1977, U.S. District Judge Kevin T. Duffy issued an opinion and order granting the Government's motion for summary judgment in the amount of \$40,000. The Government had argued that Mr. Podell's guilty plea in the criminal case estopped him from contesting his violation of 18 U.S.C. § 203 in this case, that the acts thereby admitted constituted a breach of the fiduciary

duty he owed the United States, and that the Government could therefore recover under 28 U.S.C. § 1345 all amounts paid to Mr. Podell for these activities. The court added that a violation of § 203 establishes, as a matter of law, a breach of a fiduciary duty owed the United States, and that such a criminal conviction precludes a defendant in a subsequent civil case from contesting those matters on which the conviction rests. As such, the court concluded, Mr. Podell's plea of guilty in the criminal case conclusively established his breach of his fiduciary duty and he is accountable for the breach. His affirmative defense that the statute of limitations for fraud had run was without merit, said the court, since the charge against him was not fraud, but breach of a fiduciary duty. All that remained to be determined was the amount recoverable. The court found that as a matter of law \$40,000 of the amount paid constituted Mr. Podell's compensation for his services in breach of his fiduciary duty, and granted the Government's motion for summary judgment in that amount.

On June 30, 1977, defendant filed a notice of appeal to the United States Court of Appeals for the 2d Circuit, from the order of May 31, 1977.

On July 1, 1977, Mr. Podell moved in the District Court for reargument of the Government's motion for summary judgment.

On July 28, 1977, defendant's motion for reargument was denied.

On August 3, 1977, the Court of Appeals granted defendant's motion to withdraw his appeal without prejudice to refile by September 23, 1977.

A judgment of \$78,021 was entered against defendant on August 16, 1977, representing the \$40,000 recoverable by the Government with 6-percent interest and costs.

On September 21, 1977, defendant filed an amended notice of appeal.

The Court of Appeals issued its opinion on February 6, 1978, affirming the grant of summary judgment in favor of the Government. The court rejected Mr. Podell's argument that his reluctance to acknowledge the clear implications of his guilty plea creates any material issue of fact. The court noted that it is well-settled that a criminal conviction constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case. This general rule of law was applied to the issue of Mr. Podell's guilty plea in the following manner:

Unlike most guilty plea cases, appellant's guilty plea was not entered in an evidentiary vacuum, but rather after the Government has presented its entire case and Podell had begun to present his own. The teaching of the Supreme Court in *Emich Motors v. General Motors*, [340 U.S. 558, 569 (1951)], is that in a situation involving the estoppel effect of a criminal judgment resting on a general conspiracy count, the court in a subsequent civil case should determine precisely what was decided in the criminal case by examining the record of the criminal trial, including the pleadings, the evidence submitted, and any opinions of the court. In this case, the elements of the charges in the indictment were amply supported in the trial record. [Slip Opinion at 1477-1478; this report at 435.]



Defendant-appellant Podell's argument that the Government failed to state a claim was also rejected. The opinion held that 18 U.S.C. § 218, which authorizes the United States to bring suit to recover any sum paid by the Government in relation to a violation of the conflict of interest statute, does not preclude actions to impress a constructive trust on money received by the wrongdoer from third persons.

*Status.*—No further action has been taken.

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of this report at 429.

The complete text of the opinion and order of the District Court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977, at 859.

### *Clay v. Bauman*

Cause 61857-F (Circuit Court of the City of St. Louis, Mo.)

*Brief.*—Representative William L. Clay brings action for damages in the amount of \$2 million for libel against G. Duncan Bauman (publisher of the *St. Louis Globe Democrat*), The Herald Company's Globe Democrat Division (a Missouri corporation), and Dennis McCarthy (reporter), George A. Killinberg (managing editor), and Martin Duggan (editor).

The suit was originally filed in the U.S. District Court for the District of Columbia, but pursuant to defendants' motion, the cause was dismissed from that jurisdiction on the basis of *forum non conveniens*.

On August 4, 1976, Representative Clay filed his petition for relief in Circuit Court of the City of St. Louis. He alleges that the *St. Louis Globe Democrat* printed two libelous articles about him with knowledge that both were false.

On September 24, 1976, defendants filed their answer, in which they denied the allegation that they knew or should have known the articles were untrue, asserted both articles are privileged under the First Amendment to the Constitution, and stated that their statements were true in substance in all respects.

*Status.*—The case is pending before the Missouri Court.

### *Ray v. Proxmire*

Civil Action No. 77-1522 (D.C. Cir.)

*Brief.*—On February 10, 1977, Candis O. Ray, acting as her own attorney, filed this action in the United States District Court for the District of Columbia. Named as defendants were Senator William Proxmire and his wife, Ellen Proxmire.

The complaint alleges among other things, that Mrs. Proxmire, a salaried officer of the Washington Whirl Around Tour Company, is using her position and her husband's Senate position "for profit making purposes in competition to Plaintiff, in luring the Congress—Bill—lobbying association customers away from plaintiff, damaging her and her chances of income and a livelihood, thus forcing her out of business by engaging in influence peddling and



unfair competition, and conflict of interest activities. \* \* \*” [Complaint at 2.]

On April 6, 1977, in a brief order the complaint was dismissed, and on May 3, 1977, notice of appeal was filed.

*Status.*—The case is pending before the United States Court of Appeals for the District of Columbia Circuit.

### *Young v. New York Times Company*

Civil Action No. 77-0984 (D.D.C.)

*Brief.*—On June 9, 1977, Representative John Young filed this action against the New York Times Company and the New York Times News Service which published and transmitted to numerous newspapers for publication a series of articles which asserted that Congressman Young had engaged in certain illegal and improper conduct. John Crewdson and Nicholas Horrock, both reporters for the *New York Times* who were involved in the preparation of the articles complained of, are also defendants. Also named as defendants are Colleen Gardner, a former employee of Congressman Young, and her attorney Sol Rosen, who are alleged to have entered into a conspiracy with the above-named defendants.

Congressman Young’s complaint asserts that the articles which were caused to be published by the defendants were false and published with malice in that the defendants knew that material statements in the article were false, and the statements were published with the intent of injuring him.

Congressman Young also alleges that as part of the conspiracy the defendants caused a number of telephone conversations between himself and others to be intercepted and recorded without his knowledge in an attempt to injure him. Additionally, Congressman Young alleges that in furtherance of the conspiracy defendants caused false statements to be made about him and his activities to the Federal Bureau of Investigation and the Justice Department.

Each of the acts complained of by Congressman Young was done, he asserts, for the purpose of creating a lurid scandal and to damage his private life and his public career.

As damages Congressman Young asks \$1 million in general damages and \$1 million in punitive damages.

On November 14, 1977, defendants Gardner and Rosen filed their answer to the complaint. As part of their answer they filed a counterclaim against Representative Young asserting that the complaint had been filed solely to harass them. They ask for \$2 million in damages.

An order granting the motion of plaintiff to dismiss the counterclaim was filed on January 31, 1978.

*Status.*—The action is pending before the United States District Court for the District of Columbia.

### *Rosen v. Young*

Civil Action No. 76-1663 (D.D.C.)

*Brief.*—On September 7, 1976, Sol Z. Rosen, filed this action in the United States District Court for the District of Columbia. Mr. Rosen, a Washington, D.C. attorney, alleged that Representative

John Young, had, in a press release, accused him of making false accusations about Representative Young. Later, Mr. Rosen amended the complaint to include a second count alleging that Representative Young had once again made a statement to a newspaper asserting that Mr. Rosen had made misstatements and misrepresentations about him.

*Status.*—The action is pending before the United States District Court for the District of Columbia.

### ***Gardner v. Young***

Civil Action No. 77-1435 (D.D.C.)

*Brief.*—On August 22, 1977, Colleen Gardner filed this complaint in the United States District Court for the District of Columbia. Ms. Gardner asserts that Congressman Young in two separate statements to the press made slanderous and defamatory accusations about her.

Ms. Gardner seeks \$5 million in compensatory damages and \$5 million in punitive damages for each of the two statements.

Defendant's motion to dismiss was denied on January 31, 1978.

*Status.*—The action is pending before the United States District Court for the District of Columbia.

### ***Helstoski v. Goldstein***

Civil Action No. 75-1802 (D.N.J.)

*Brief.*—On October 21, 1975, then-Representative Henry Helstoski filed this suit as a class action primarily seeking injunctive relief against the Office of the United States Attorney for the District of New Jersey and Jonathan Goldstein, the United States Attorney for that district, to prevent alleged violations of the plaintiff's constitutional rights. The complaint set out "innumerable violations of due process in the utilization of multiple Grand Juries" and "numerous violations of the plaintiff's rights which were occurring as a result of an alleged investigation being conducted by the defendants. \* \* \* " [Brief and Appendix on Behalf of Henry Helstoski—Plaintiff-Appellant at 1.]

Mr. Helstoski asked the court to mandate several remedial actions including damages, the disqualification of the defendant-prosecutors relative to the investigation of the plaintiff, an injunction against certain activities taken by the prosecutors allegedly in violation of the plaintiff's rights, and the return of numerous of plaintiff's records which had been obtained by the defendants.

On January 12, 1976, the defendants moved for a dismissal. On June 2, 1976, an indictment was returned against the plaintiff [see *United States v. Helstoski*; *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.] And 6 days later, on June 8, 1976, the defendants' motion to dismiss in this action was granted.

Appeal was taken by the plaintiff to the Third Circuit Court of Appeals.

On March 28, 1977, the Court of Appeals issued its *per curiam* opinion reversing the judgment of the District Court and remanding the action for further proceedings.

The court concluded that certain of the allegations made in Mr. Helstoski's complaint assert action by the U.S. Attorney's office which are outside the sphere of the proper elements of a prosecutor's job. The court particularly noted that Mr. Helstoski had asserted that the U.S. Attorney's office deliberately leaked false information about him in an effort to injure him politically. This type of activity, the court declared, if it occurred, would "lie outside of the rationale for absolute immunity. \* \* \* At most, it would be subject to a qualified good-faith immunity." [*Helstoski v. Goldstein*, 552 F.2d 564, 566 (3rd Cir. 1977).]

On June 13, 1977, Mr. Helstoski filed a motion in the District Court seeking an entry of a default judgment, a bar to the use of Government funds, and a bar to the taking of depositions by defendant.

On the same day, the defendant filed an answer and a demand for a jury trial.

On September 1, 1977, plaintiff's motion for entry of default judgment was withdrawn.

On the same day, plaintiff's motion to file an amended complaint was granted.

The amended complaint, filed on September 30, 1977, sought a declaratory judgment that plaintiff's rights under the First, Fifth, and Sixth Amendments of the U.S. Constitution and the principles of the Separation of Powers have been violated as well as \$250,000 in compensatory damages and an equal amount in punitive damages, in lieu of the injunctive relief sought in the original complaint.

*Status.*—The case is pending in the United States District Court for the District of New Jersey.

The complete text of the opinion of the Court of Appeals is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 2, August 15, 1977.

### ***United States v. Tonry***

Criminal Action No. 77-260 (E.D.La.)

*Brief.*—On May 12, 1977, Richard A. Tonry, who 8 days earlier had resigned from the U.S. House of Representatives, was indicted on 11 counts for conspiracy to obstruct justice (18 U.S.C. § 371); promising benefits for political contributions (18 U.S.C. §§ 2, 600); violating the Federal Election Campaign Act (various sections of 2 U.S.C. §§ 431-441(j) and 18 U.S.C. § 2); obstructing justice (18 U.S.C. §§ 2, 1503) making false declarations before a grand jury (18 U.S.C. § 1623).

Indicted with Mr. Tonry was John W. Mumphrey, a former law partner of Mr. Tonry, chairman of his campaign for Congress and his Congressional district director.

On July 1, 1977, the Government filed a bill of information charging Mr. Tonry with one count of conspiracy, one count of accepting political contributions in violation of the Federal Election Campaign Act, and two counts of promising benefits for political contributions. Mr. Tonry pled guilty that day to all four counts. The indictment was then dismissed as to Mr. Tonry and Mr. Mumphrey.

On July 28, 1977, Mr. Tonry was sentenced to serve 1 year in prison, fined \$10,000, and placed on probation for 3 years during which time he may not run for political office or engage in political activity.

On August 15, 1977, Mr. Tonry entered the Federal Prison Camp at Maxwell Air Force Base in Montgomery, Ala., to begin serving his sentence.

On November 11, 1977, Mr. Tonry filed a motion for reduction of sentence which was heard on December 14, 1977.

*Status.*—Mr. Tonry's motion for reduction of sentence is pending before the District Court.

### *Cervase v. Rangel*

Civil Action No. 76 CIV 4344 (S.D.N.Y.)

*Brief.*—On September 30, 1976, this action was filed in the United States District Court for the Southern District of New York.

The complaint alleges that the defendant Representative Charles Rangel has mailed, under his frank, and in envelopes printed at Government expense, newsletters and literature from the Congressional Black Caucus.

Mr. Cervase asserts that these mailings which he alleges causes public money to be spent for the benefit of a private corporation violate 39 U.S.C. § 3210.

The complaint asks for a declaratory judgment that the mailings violate the law, and for an injunction prohibiting Congressman Rangel from using his frank for the mailing of Congressional Black Caucus documents.

On March 1, 1977, Representative Rangel filed a motion to dismiss. As grounds he asserted that 2 U.S.C. § 501(e) denied the jurisdiction of the courts over this subject matter and that the amount in controversy did not meet the \$10,000 threshold requirement for diversity jurisdiction.

*Status.*—The action is pending before the District Court.

### *United States v. Goldberg*

Criminal Action No. 77-33 (D. Mass.)

*Brief.*—Defendants in this case are, according to the indictment, Blue Ribbon Frozen Food Corporation, Inc. (hereinafter "Blue Ribbon"), located in Hamden, Conn. and its wholly owned subsidiary, G & G Packing Co., Inc. (hereinafter "G & G"), located in Roxbury, Mass., both of whose principal business was the processing and sale of beef to the U.S. Department of Defense, Defense Supply Agency, Harry Goldberg, a joint owner and president of both firms; David Frank Goldberg, a joint owner of both firms, vice president and treasurer of Blue Ribbon and treasurer of G & G; Stephan Goldberg, Fred Romano, and Frank Ravasini, all employees of G & G; and Manuel Pacheco, a senior Army meat inspector, assigned by the Army to inspect meat for it at G & G. The indictment was returned by a grand jury sitting in the district of Massachusetts on February 2, 1977, and a superseding indictment was returned on March 16, 1977.

The indictment charged each defendant with one count of violating 18 U.S.C. § 371 (conspiracy), 23 counts of violating 18 U.S.C. § 210 (bribery and gratuities), and 24 counts of violating 18 U.S.C.



§ 1001 (concealment). In general the nonmilitary defendants were charged with providing Department of the Army meat inspectors with bribes in exchange for their accepting from Blue Ribbon and G & G lower grades of meat than were called for by Army regulations, and by accepting less costly cuts, of meat which the employee-defendants of the firms had prepared to resemble more expensive cuts.

On March 14, 1977, pursuant to a plea bargain agreement, Mr. Pacheco pleaded guilty to the conspiracy count of the indictment. His disposition date was continued.

On April 25, 1977, defendants Harry Goldberg, Blue Ribbon, and G & G filed a plea bargain agreement in which Mr. Goldberg pleaded guilty to the conspiracy count and one count of bribery, and the corporations pleaded guilty to the conspiracy count. Their cases were continued for disposition until the conclusion of the remainder of the case.

On June 24, 1977, the Senate adopted S. Res. 205, 95th Cong., 1st Sess. (1977), which reads in part:

Sec. 4. That, Senator Lawton Chiles, Senator Lowell Weicker, and Senator Sam Nunn are authorized in response to subpoenas *duces tecum*; and Lester A. Fettig, Claudia T. Ingram, and Edward Roeder are authorized in response to subpoenas *add testificandum*; issued on behalf of Ferdinand Romano, defendant in the case of *United States v. Harry Goldberg et al.*, (No. CH-77-33-C) pending in the United States District Court, District of Massachusetts to appear together with documents relating to the consideration of Congressional use immunity for said defendant and to testimony taken under a grant of such immunity, and testify to and only to, any alleged proffers of information made by the above named defendant or his counsel to a Senator of the United States or an officer or employee of the United States Senate, any testimony taken under a grant of use immunity to said defendant, the use, if any, of information obtained from any such proffers and to information, if any, turned over to the Department of Justice of the United States as a result of any such proffers or testimony.

On September 26, 1977, a plea bargain agreement was filed, and a plea of guilty entered by David Frank Goldberg. The action against him was continued for disposition until the conclusion of the rest of the case.

On November 9, 1977, the court found Mr. Romano to be competent to stand trial and a trial by jury of the charges against him was begun on November 14, 1977. On November 17, 1977, the jury returned a verdict of guilty.

The indictment against Stephen Ira Goldberg was dismissed on January 4, 1978. Also, on January 4, 1978, the other defendants were sentenced. Defendant Harry Goldberg was sentenced to 4 years in prison on count 1 and 2 years in prison on count 2, to be served concurrently and fined \$5,000 on each of counts 1 and 2 for a total fine of \$10,000. Defendant David Frank Goldberg was sentenced to 4 years in prison and fined \$10,000. Defendant Frank

Ravasini was sentenced to 3 years in prison and fined \$5,000. Defendants Blue Ribbon Frozen Foods Corp., Inc. and G & G Packing Company, Inc., were both fined \$10,000. On May 2, 1978, defendant Ravasini moved for a reduction of his sentence.

*Status.*—No further action has been taken.

***Attorney General of the United States v. Casey, Lane and Mittendorf***  
Civil Action No. 77-1272 (D.D.C.)

*Brief.*—This complaint was filed in the U.S. District Court for the District of Columbia on July 21, 1977, by the Attorney General of the United States against: Casey, Lane & Mittendorf (hereinafter "Casey, Lane") a New York City law firm with an office in Washington, D.C.; John R. Mahoney, a partner in "Casey, Lane"; Philip R. McKnight, an associate in "Casey, Lane" until August 1976; the "South Africa Foundation" (hereinafter "Foundation"), an entity comprised of, among others, member corporations and individuals, with headquarters in South Africa and an office in the District of Columbia; and John Chettle, the director of the Foundation's office in the United States.

According to the complaint, "Casey, Lane" is the registered agent of the South African Sugar Association (hereinafter "SASA"), and Mr. Mahoney and Mr. McKnight were the attorneys who were principally responsible for representing SASA in this country. Their principle concern was in obtaining sugar quotas for SASA, and they often appeared before committees of Congress, "especially the Agriculture Committee of the House of Representatives" [Complaint at 3], prepared testimony, and lobbied Members and committee staff. The Foundation is the registered foreign agent of its home office. SASA is the largest financial contributor to the Foundation, and certain SASA officials are also officials of the Foundation. The Foundation often assisted "Casey, Lane" in its lobbying on behalf of SASA. Furthermore, from November 1968 to May 1975, "Casey, Lane" was counsel for the Foundation.

The complaint charges in the first count that in September 1970, defendants Mahoney, McKnight, and "Casey, Lane" assisted SASA in extending an invitation to Representative W. R. Poage, at that time, Chairman of the House Agriculture Committee, to visit South Africa while he and other Congressmen were traveling through Africa on official business, and that they provided Representative Poage and two unnamed Congressmen on the House Agriculture Committee with a private executive jet to travel to Rhodesia and back to South Africa at no expense to them. In order to avoid a conflict of interest because the Congressmen were members of a committee which was instrumental in providing sugar quotas, the defendants assisted with travel preparations to make it appear that the Foundation, not SASA, had been the host. In March 1972, the complaint alleges, the "Casey, Lane" defendants learned Congressman Poage would again be in Africa, and again a private executive jet transported the Congressman and his administrative assistant from Rhodesia to South Africa at no expense to them, and again it was made to appear that the Foundation had paid the expenses, and not SASA, which really had paid them. The complaint further alleges that in June 1973, the "Casey, Lane" defendants assisted SASA in extending an invitation to Representative William C. Wampler, a member of the House Agriculture Committee, and

John F. O'Neal, at that time general counsel to the Committee to visit South Africa. Both received a free 10-day visit in August 1973, and again SASA paid the expenses but defendants made it appear that the Foundation did so. Finally, the first count of the complaint asserts that from November 1970, to January 1974, defendants filed false and misleading foreign registration statements. Defendants are alleged in count one to have violated Section 2(b) of the Foreign Agents Registration Act of 1939 (hereinafter "Act") as amended, 22 U.S.C. § 612(b) and Rule 203 thereunder, 28 C.F.R. § 5.203.

Count two of the complaint asserts; that in November 1971, an official of SASA, at the urging of Mr. Mahoney, presented to Representative Poage eight-round trip tickets between Washington, D.C., and Dallas, Tex., worth about \$18,000, which were given to him with the express purpose of aiding him in his 1972 re-election campaign; that Mr. Mahoney had the tickets purchased in the name of an individual who had no connection with the purchase or ownership of the tickets; and that in December 1971, Mr. Mahoney had that individual endorse the tickets so that they could be transferred to Representative Poage. Also alleged, is that in December 1971, a \$1,000 cash contribution to the Democratic Congressional Campaign Committee, which was specifically allocated to Representative Poage, was made by SASA, but that the money had been channeled through "Casey, Lane" in whose books Mr. Mahoney made it appear as though it was his personal contribution. Finally, count two alleged that Mr. Mahoney caused "Casey, Lane" to file false and misleading statements omitting these activities. By reason of all these activities, count two charges defendants Mahoney and "Casey, Lane" with violating Sections 2(b) of the Act, 22 U.S.C. § 612(b) and Rule 203 thereunder, 28 C.F.R. § 5.203.

The complaint asked the court to issue: (1) a permanent injunction restraining and enjoining the defendants from violating Section 2(b) of the Act, 22 U.S.C. § 612(b) and Rule 203, 28 C.F.R. § 5.203; (2) a mandatory injunction requiring "Casey, Lane" and the Foundation to file supplemental statements "disclosing time and accurate information regarding all of their activities engaged in by Defendant registrants on behalf of their foreign principals to include full details of all political activities, including among other things, their relations, interests and policies sought to be influenced and the means employed to achieve such purposes, as well as full disclosure of their financial activities for the period January 1, 1970 to date hereof," and (3) a permanent injunction restraining and enjoining defendants from acting as foreign agents until they have complied with relief sought in (1) and (2) above.

On October 17, 1977, defendants South Africa Foundation and Chettle filed a joint answer to the complaint and a joint motion to dismiss count two of the complaint.

On October 20, 1977, defendant Mahoney filed an answer to the complaint.

On November 3, 1977, the motion of defendants Foundation and Chettle to dismiss count two of the complaint was granted and count two was dismissed as to those two defendants.



*Status.*—The case is pending before the U.S. District Court for the District of Columbia.

***United States ex rel. Joseph v. Cannon***

Civil Action No. 77-0452 (D.D.C.)

*Brief.*—This suit was filed March 15, 1977, by a private citizen, Joel D. Joseph, pursuant to 31 U.S.C. §§ 231 and 232 (the False Claims Act), which allows a private citizen to file a claim on behalf of the United States against any person making a false claim for money upon the United States. Anyone convicted under Section 231 shall pay and forfeit \$2,000, plus double the amount of damages the United States may have suffered as a result of the false claim, as well as the costs of the suit. Under Section 232, the relator is required to notify the Justice Department of the suit and the Justice Department is then allowed 60 days in which to take over the case. If an appearance is entered by the United States, the private citizen may be awarded fair and reasonable compensation, in amount not exceeding one-tenth of the amount recovered, for disclosure of information or evidence not in the possession of the United States when the suit was brought. If the case is not taken over by the United States, the relator may be awarded up to one-fourth of the amount recovered as compensation for his services.

Defendant Howard W. Cannon is a U.S. Senator from Nevada. Chester B. Sobsey, Administrative Assistant to Senator Cannon, is also named as a defendant in the suit.

The complaint alleges that from March of 1975 to November 1976, defendant Sobsey worked extensively and exclusively on Senator Cannon's re-election campaign or on related tasks not part of Senator Cannon's official duties, and that Senator Cannon knowingly authorized and Sobsey knowingly accepted regular pay for services ostensibly performed as Senator Cannon's Administrative Assistant during this period, although such services " \* \* \* were not performed or otherwise performed in a prefatory or nominal manner." [Complaint at 3.] It is further alleged by the complaint that during this period " \* \* \* and at other times \* \* \*" Senator Cannon:

had other members of his staff perform services to him and his family, which were not part of Senator Cannon's official legislative and representational duties, but were nevertheless paid with public funds. [Complaint at 3.]

The relator's complaint contends that the alleged acts constitute violation of 31 U.S.C. § 231.

On May 27, 1977, the Justice Department declined to enter an appearance on behalf of the United States.

On June 27, 1977, defendants filed a motion to dismiss.

*Status.*—No further action has been taken.

***United States v. Hanna***

Criminal No. 77-00607 (D.D.C.)

*Brief.*—On October 14, 1977, the United States filed an indictment against former U.S. Representative Richard T. Hanna. The indictment consisted of 40 separate counts, and charged Hanna with the violation of 6 separate U.S. statutes; 18 U.S.C. § 371 (con-



spiracy to commit offense or to defraud United States); 18 U.S.C. § 201(c) (1) and (2) (bribery of public officials and witnesses; 18 U.S.C. § 201(g) (illegal gratuity); 22 U.S.C. §§ 612, 618 (Foreign Agent Registration Act); and 18 U.S.C. § 1341 (mail fraud). Also named as unindicted co-conspirators in the indictment were Tong Sun Park, a citizen of the Republic of Korea; Kim Hyung Wook, Director of the Korean Central Intelligence Agency between 1963 and 1969, and Lee Hu Rak, Director of the Korean Central Intelligence Agency between 1970 and 1973.

On December 8, 1977, defendant moved for dismissal of the indictment, for production of documents, for production of all electronic overhearings or interceptions of his communications, and for severance of the counts of the indictment for the purpose of trial.

On January 9, 1978, defendant moved to dismiss the indictment. The motion was heard, argued and taken under advisement.

The motion to dismiss was denied on February 15, 1978.

A plea agreement was filed on March 17, 1978. Defendant withdrew his plea of not guilty and pleaded guilty to count one.

*Status.*—On April 24, 1978, defendant was sentenced to not less than 6 months nor more than 30 months on count one. The remaining counts were dismissed.

#### *Banta v. Talmadge*

Civil Action No. 77-1996 (D.D.C.)

*Brief.*—On November 21, 1977, Frank H. Banta filed this action in the Federal District Court for the District of Columbia. The complaint styled "Complaint for Writ in the Nature of Mandamus", seeks an order which apparently would direct the four United States Senators named as defendants [Talmadge, Scott, Bayh, and Byrd of West Virginia) to introduce a resolution in the Senate which would disband the Federal Bureau of Investigation and void that agency's charter.

On March 13, 1978, the complaint was dismissed by U.S. District Judge Smith. In his order, he stated that the complaint failed to state a claim upon which relief could be granted, was frivolous, and was clearly without merit and that the individually named defendants had not been properly served.

*Status.*—No further action has been taken.

#### *United States Postal Service v. Citizens Committee For The Right To Keep And Bear Arms*

No. C77-846S (W.D. Wash.)

*Brief.*—The General Counsel of the U.S. Postal Service brought an administrative complaint (Postal Service Docket No. 6/48) against the Citizens Committee For The Right To Keep And Bear Arms (hereinafter "Committee") on November 18, 1977. The administrative complaint alleged that the Committee was engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S.C. § 3005.

Specifically, the Committee was charged with sending literature to various people seeking support and contributions for its cause in window envelopes through which the notation "From Congressman [name of addressee's Congressman]" was visible. The notation, or

the notation together with the contents of the mailing piece might have been reasonably construed as making some or all of three allegedly false representations, according to the administrative complaint. The alleged representations are: (1) That the Congressional Representative whose name appears on the mailing piece sent the mailing piece; (2) That the Representative authorized the Committee to use his or her name in such a manner; (3) That the Representative is involved in an unstated way with the solicitation. Alternatively, the administrative complaint alleges that the contents of the mailing piece together with the notation noted above are at best ambiguous, creating confusion on the part of the reader in regard to the three representations noted above. An order conforming with 39 U.S.C. § 3005(a) (1) and (2) against the Committee was requested in the administrative complaint. 39 U.S.C. § 3005(a) reads as follows:

“(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which—

“(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

“(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.”

On November 22, 1977, the United States Postal Service filed a complaint against the Committee in the United States District Court for the Western District of Washington. The complaint sought a temporary restraining order and preliminary injunction pursuant to 39 U.S.C. § 3007 directing the detention by the Postal Service of defendant's incoming mail addressed to the Committee, subject to the defendant's right to examine and receive mail clearly not related to the representations complained of, pending the outcome of the statutory proceedings against the Committee and any appeals therefrom.

The temporary restraining order and preliminary injunction were granted on November 23, 1977.

A consent agreement was reached between the Postal Service and the Committee on December 22, 1977. Under its terms, the Committee stipulated that it would permanently refrain from solicitation practices of the type alleged in the administrative com-

plaint and that it would return, with a specified written explanation, all remittances being detained by order of the District Court and other remittances received in the future related to the discontinued activities.

The agreement also stipulated, that the General Counsel of the Postal Service may, without prior notice and on an *ex parte* basis seek an interim order against the Committee from the Judicial Officer of the Postal Service. The Postal Service agreed to dismiss the administrative action and have the preliminary injunction vacated.

**Status.**—The preliminary injunction was vacated and the complaint dismissed on January 5, 1978.

The full text of the consent agreement is printed in the Addendum to the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress*, Part 3, December 31, 1977.

**United States v. Passman** (New Case)

Criminal Case No. 78-00159 (D.D.C.)

**Brief.**—Otto E. Passman, former U.S. Representative from Louisiana, was indicted on March 31, 1978, in U.S. District Court for the District of Columbia on one count of conspiracy (18 U.S.C. § 371), three counts of bribery (18 U.S.C. § 201(c)(1)), and three counts of receiving illegal gratuities (18 U.S.C. § 201 (g)).

The indictment is primarily based upon alleged activities carried out by then-Congressman Passman and Tong Sun Park, named as an unindicted co-conspirator, in regard to the sale of U.S. rice to Korea under the Food-For-Peace Program (PL-480).

**Status.**—The case is pending before the District Court.

**United States v. Diggs** (New Case)

Criminal Case No. 78-00142 (D.D.C.)

**Brief.**—On March 23, 1978, Charles C. Diggs, Jr., Representative for the 13th Congressional District of Michigan, was indicted in the U.S. District Court for the District of Columbia. Representative Diggs is charged with 14 counts of violating 18 U.S.C. § 1341 (Mail Fraud) and 21 counts of violating 18 U.S.C. § 1001 (False Statement).

18 U.S.C. § 1341 reads, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises \* \* \* for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter; any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 provides the same penalties for anyone who



in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsified, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entity \* \* \*

The indictment alleges that Representative Diggs:

[D]id devise and intend to devise a scheme and artifice to defraud the United States of America, and to obtain money and property by false and fraudulent pretenses, representations and promises, which defendant Diggs knew would be and were false when made.

Further allegations in the indictment state that Representative Diggs:

[I]n order to pay for his personal, business, and House of Representative expenses, would and did divert and cause to be diverted from the Treasury of the United States a sum in excess of one hundred and one thousand dollars (\$101,000.00) in the form of salary kickbacks from certain House of Representatives employees and payments to others on the House of Representatives payroll who performed no work for the House of Representatives. [*United States v. Diggs*, Cr. No. 78-142 (D.D.C.) (Indictment at 2).]

On April 28, 1978, Representative Diggs filed a motion for a bill of particulars, a motion for discovery and inspection, and a motion to dismiss for selective prosecution counts 5 through 14 and 24 through 35 of the indictment. In a memorandum in support of the motion to dismiss, Congressman Diggs asserted that although the Justice Department was aware of allegations that other Members of Congress were involved in activities similar to those alleged against him, no prosecution was instigated against those other Members.

The Government filed oppositions to each of the three motions on May 5, 1978.

On May 9, 1978, defendant's motion to dismiss counts 5 through 14 and 24 through 35 was heard and denied.

*Status.*—The case is pending before the District Court.

#### ***Metzenbaum v. Brown*** (New Case)

No. 78-188 (D.D.C.)

*Brief.*—Two U.S. Senators, Howard M. Metzenbaum of Ohio and Barry M. Goldwater of Arizona filed this action in the U.S. District Court for the District of Columbia on February 2, 1978. Named as defendants are the Secretary of Defense, Harold Brown and the Secretary of the Navy, W. Graham Claytor, Jr. In the "Complaint for Declaratory Judgment," the Senators seek to have declared unlawful the attempted procurement by the Department of the Navy of 22 CTX utility aircraft. Also sought are a temporary restraining order and preliminary and permanent injunctions against completion of procurement of said aircraft by any means other than competitive bidding and a mandatory order directing



that said procurement be made solely through a process of formal advertising for competitive bids.

On February 7, 1978, Beech Aircraft Corporation (hereinafter "Beech"), which had been named in the complaint as having received a letter-contract from the Navy for purchase of the 22 aircraft, moved to intervene as a defendant. Defendants Brown and Claytor filed a response to Beech's motion to intervene on February 10, 1978. While not objecting to the presence of Beech as a co-defendant, Brown and Claytor declared that the case is presently nonjusticiable in that the Senators lack standing to sue and judicial consideration of the Senators' claims is barred by the political question doctrine. Beech's motion to intervene was granted on February 14, 1978, for the limited purpose of addressing the question of jurisdiction.

Cessna Aircraft Corporation (hereinafter "Cessna") moved to intervene as a party plaintiff on February 14, 1978. Cessna's motion to intervene was granted on February 21, 1978, also for the limited purpose of addressing the question of jurisdiction.

Defendants Brown and Claytor moved to dismiss on February 22, 1978. The motion to dismiss was granted and the motions to intervene denied in an order and accompanying memorandum filed on March 14, 1978.

District Judge Oberdorfer stated in his memorandum that the validity of the Senators' claim to standing hangs upon the question of whether a legislator who voted for a bill which became law has standing, as a legislator, to sue to require administration of the law in accordance with his interpretation of the law. *Harrington v. Bush*, U.S. 180 App. D.C. 45, 553 F.2d 190 (D.C. Cir. 1977) was held to be controlling. The memorandum stated:

As the Court reads *Harrington*, once the 1978 Appropriation became law, any constitutionally protected interest of the Senators in it entitled to judicial protection ended. They retain, of course, all the legislative prerogatives of powerful Senators, not only to communicate directly with the President and the Secretaries, but also to exercise legislative oversight over the administration of the 1978 Appropriation by (among other means) committee investigation and hearing, or by seeking intervention by the General Accounting Office to prevent unlawful expenditure of funds appropriated for this Navy procurement. But under *Harrington*, they are, for purposes of their standing to sue in court, in the same status as any other public spirited citizen concerned that the Secretaries administer the validly enacted 1978 Appropriation according to law. With respect for the Senators (and for the principle of Separation of Powers), the Court has therefore concluded that the complaint does not allege facts showing actionable injury to their constitutional right to vote to make laws for the procurement of naval aircraft or to their official influence in that process. [Slip Opinion at 11; this report at 446.]

*Status.*—No further action has been taken.

The memorandum of the District Court is printed in the "Decisions" section of this report at 439.

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## DECISIONS

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In the United States District Court for the  
District of Columbia

Civil Action No. 77-1230

PAUL LAXALT ET AL., PLAINTIFFS

v.

J. S. KIMMITT ET AL., DEFENDANTS

ORDER

Defendants having filed motions requesting the Court:

1. To dismiss the action for failure to state a claim upon which relief can be granted,

2. To dismiss the action for want of a judicial question within the jurisdiction of the Court to determine,

3. To dismiss the action for want of the requisite jurisdictional amount,

4. (a). To dismiss the Plaintiff, Committee for the Survival of a Free Congress, for want of standing, and

4. (b). To vacate the order granting leave to Common Cause, David Cohen and Nan Waterman to intervene as parties defendant, or in the alternative to dismiss the Intervenor as parties for want of standing; and

the Plaintiffs and Intervening Defendants having submitted their memoranda in opposition to said motions and Intervening Defendants having moved to dismiss the Complaint for failure to state a claim and for lack of subject matter jurisdiction, and the Court having heard oral argument on behalf of Plaintiffs and Defendants, and having considered the written submissions of all parties,



The Court now concludes that the First Amended Complaint sufficiently alleges the requisite jurisdictional amount; that Rule XLIV of the Rules of the United States Senate, does not add to the Constitutional qualifications for membership in the United States Senate and does not deprive the plaintiffs of freedom of speech; that the classification on the basis of different sources of income does not constitute an unlawful discrimination; and that plaintiffs have therefore failed to state a claim on which relief can be granted; and the Court further concludes that the Complaint as amended does not allege a justiciable case or controversy;

The Court further concludes that its disposition of the foregoing issues raised by the motions of the Defendants makes it unnecessary to dispose of the issue raised with respect to standing.

IT IS THEREFORE ORDERED, that this action be and it hereby is dismissed.

GEORGE L. HART, Jr.,  
*United States District Judge.*

Dated: *March 13, 1978.*

**Shirley DAVIS, Plaintiff-Appellant,**

**v.**

**Otto E. PASSMAN, Congressman of  
the United States,  
Defendant-Appellee.**

**No. 75-1691.**

United States Court of Appeals,  
Fifth Circuit.

April 18, 1978.

Action was brought against member of United States House of Representatives, alleging that he violated the Fifth Amendment by discharging female staff member because of her sex. The United States District Court for the Western District of Louisiana, Tom Stagg, J., dismissed and former staff member appealed. The Court of Appeals, Goldberg, Circuit Judge, 544 F.2d 865, reversed and remanded, and court granted rehearing en banc. The Court of Appeals, Charles Clark, Circuit Judge, held that congressional staff member allegedly discharged by former Congressman because of her sex had no private cause of action against former Congressman for money damages under due process clause of Fifth Amendment, in view of fact that Constitution did not compel an action for money damages implied from due process clause, Congress avoided creating action for money damages for congressional aides in noncompetitive positions, and implying such a damage action would necessarily draw into the federal judiciary system a wide range of cases whose resolution Congress had not committed to federal judiciary and whose resolution was better suited to courts of general jurisdiction.

Affirmed in part, and vacated in part.

Jones, Circuit Judge, concurred specially and filed opinion.

Roney, Circuit Judge, concurred specially and filed opinion.

Goldberg, Circuit Judge, dissented and filed opinion in which Brown, Chief Judge, joined.

### 1. Action ⇌ 3

Courts consider several factors in determining whether to imply a cause of action from a statutory right: whether provision asserted creates a special right in the plaintiff; whether action of Congress in field indicates intent to allow such remedy or at least an intent not to deny the remedy; whether implication of remedy would be consistent with purpose of right asserted, and whether cause of action implied would be one appropriate for federal law.

### 2. Federal Courts ⇌ 177

Not every right that conceivably could be wedged within literal breadth of due process demands federal protection through a cause of action for monetary damages. U.S.C.A.Const. Amend. 5.

### 3. Federal Courts ⇌ 178

Congressional staff member allegedly discharged by former Congressman because of her sex had no private cause of action against former Congressman for money damages under due process clause of Fifth Amendment, in view of fact that Constitution did not compel an action for money damages implied from due process clause, Congress avoided creating action for money damages for congressional aides in noncompetitive positions, and implying such a damage action would necessarily draw into the federal judiciary system a wide range of cases whose resolution Congress had not com-

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mitted to federal judiciary and whose resolution was better suited to courts of general jurisdiction. U.S.C.A.Const. Amend. 5.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, Chief Judge, JONES, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

In today's decision the court en banc reverses a panel opinion which implied a cause of action for money damages from the Due Process Clause of the fifth amendment of the Constitution.<sup>1</sup>

In her complaint, Ms. Shirley Davis alleged that former Louisiana Congressman Otto Passman dismissed her as his Deputy Administrative Assistant solely because she was a woman and he wanted a man in the position. Davis claimed Passman's actions violated the equal protection component of the fifth amendment Due Process Clause. Invoking the court's jurisdiction under 28 U.S.C.A. § 1331(a), she sought specific relief, damages, and declaratory relief. Because Passman's service in Congress ended after the suit was brought, the claim has narrowed to one for recovery of money

damages. The district court based its dismissal of the complaint on alternative grounds: (1) that the law affords Davis no private right of action and (2) that the conduct of which she complained did not violate the Constitution. Addressing only the surviving claim for money damages, we affirm the district court's dismissal on the first ground.

The roster of constitutional rights which have been held to support implied damage actions began its growth with the Supreme Court's seminal decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens*, the Court noted that historically damages have been regarded as the "ordinary remedy for an invasion of personal interests in liberty," and implied a cause of action for money damages for the invasion of the plaintiff's liberty which abridged his fourth amendment rights. 403 U.S. at 395, 91 S.Ct. at 2004, 29 L.Ed.2d at 626.

Although the Supreme Court has neither extended nor further explained its initial position, many inferior federal courts have cited *Bivens* as authorizing implied actions for money damages based on constitutional rights other than the fourth amendment.<sup>2</sup> Generally, these decisions have recognized implicitly that *Bivens* has some yet unreached limits. Only isolated district court decisions have asserted that *Bivens* created damage actions for violation of constitutional

1. The opinion of the panel, 544 F.2d 865 (5th Cir. 1977), had, in turn, reversed the district court's dismissal of a complaint filed by a discharged female congressional employee.

2. Apart from the Due Process Clauses, lower federal courts have looked favorably upon *Bivens* actions based upon the first, sixth, eighth, ninth, and thirteenth amendments. See, e. g., *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments);

*Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (first amendment); *Jihaad v. Carlson*, 410 F.Supp. 1132 (E.D.Mich.1976) (first and eighth amendments); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144, 160-62 (D.D.C. 1976) (first and sixth amendments); *Patmore v. Carlson*, 392 F.Supp. 737 (E.D.Ill.1975) (fifth and eighth amendments). See also M. Lehmann, *Bivens and Its Progeny*, 4 Hastings Const. L.Q. 531, 566-72 (1977).

rights as broadly as if it had decreed that 42 U.S.C.A. § 1983 applied to the federal government.<sup>3</sup> This appeal requires either that we join other circuits in projecting the scope of *Bivens* to the Due Process Clauses of the fourteenth and fifth amendments,<sup>4</sup> or decline to follow their precedents. A choice is not foreclosed. In more than one decision the Supreme Court specifically has pointed out that this issue remains open.<sup>5</sup>

Our own decisions appear equivocal on this point. We have ruled district courts erred in finding no jurisdiction to consider damage claims based upon implied causes of action under the Due Process Clauses of both the fifth amendment, *Weir v. Muller*, 527 F.2d 872 (5th Cir.

1976), and the fourteenth amendment, *Reeves v. City of Jackson*, 532 F.2d 491, 495 (5th Cir. 1976). See also *Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n.1 (5th Cir. 1975); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 801-02 & n.2 (5th Cir. 1974); *Traylor v. City of Amarillo*, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974). However, in *Rodriguez v. Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc), we expressly declined to speak as an en banc court on the appropriateness of extending *Bivens* beyond the fourth amendment. Now we find ourselves face-to-face with the necessity to take a firm position.

3. E. g., *Saffron v. Wilson*, 70 F.R.D. 51, 53 n.1 (D.D.C. 1975) ("This holding [*Bivens*] has been interpreted almost unanimously as recognizing a cause of action for damages for violation of any constitutionally protected interest."); *Gardels v. Murphy*, 377 F.Supp. 1389, 1398 (N.D. Ill. 1974) ("Bivens recognizes a cause of action for damages for violation of any constitutionally protected interest.")

4. Several circuits have allowed plaintiffs to base *Bivens* implied actions solely upon the concept of due process: the Second Circuit, *Gentile v. Wallen*, 562 F.2d 193, 196 (2d Cir. 1977) (fourteenth amendment); the Third Circuit, *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); but see *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977) (declining to allow cause of action on fourteenth amendment alone); the Fourth Circuit, *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); the Seventh Circuit, *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 718-19 & n.7 (7th Cir. 1975) (denying relief, but holding action could be brought solely under fourteenth amendment); the Eighth Circuit, *Owen v. City of Independence*, 560 F.2d 925, 932 (8th Cir. 1977) (fourteenth amendment in suit seeking back pay); the Ninth Circuit, *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 936-37, 941-43 (9th Cir. 1977) (one cause of action available on fifth amendment just compensation

clause and another on fifth amendment due process clause).

Other circuits have commented favorably upon extension of *Bivens* to actions implied from the concept of due process: the Tenth Circuit, e. g., *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 932 & n.5 (10th Cir. 1975) (apparently referring to the fifth amendment); the D.C. Circuit, e. g., *Lewis v. D.C. Dep't of Corrections*, 174 U.S.App.D.C. 483, 484, 533 F.2d 710, 711 (1976).

The First Circuit has declined to imply a cause of action against municipalities from the fourteenth amendment Due Process Clause to grant damages for wrongful death. *Kostka v. Hogg*, 560 F.2d 37, 44 (1st Cir. 1977).

5. In several cases since *Bivens*, the Supreme Court has expressly left open the question whether an action for damages might be implied from the Due Process Clauses. *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 277, 97 S.Ct. 568, 571, 50 L.Ed.2d 471, 477 (1977); *Aldinger v. Howard*, 427 U.S. 1, 3 n.3, 96 S.Ct. 2413, 2415-16 n.3, 49 L.Ed.2d 276, 280 n.3 (1976); *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 284 n.1, 96 S.Ct. 2036, 2038 n.1, 48 L.Ed.2d 636, 639 n.1 (1976); *District of Columbia v. Carter*, 409 U.S. 418, 432-33, 93 S.Ct. 602, 610, 34 L.Ed.2d 613, 624 (1973). See also *City of Kenosha v. Bruno*, 412 U.S. 507, 514, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109, 116 (1973).



To decide whether to imply a cause of action for money damages from the fifth amendment Due Process Clause, we must examine *Bivens* itself. While *Bivens* is not without ambiguity, the analysis employed by the Court shows that the cause of action created is not wholly of constitutional dimensions. The opinion of the Court expressly states:

we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

403 U.S. at 397, 91 S.Ct. at 2005, 29 L.Ed.2d at 627. The cases relied upon for guidance by the Court in *Bivens* dealt with implying a cause of action from federal statutes that created rights but provided no federal remedy.<sup>6</sup> Moreover, in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court's most comprehensive treatment of implied statutory causes of action, the Court relied upon *Bivens* to support two points of its four-part statutory analysis.<sup>7</sup>

If the fourth amendment had mandated a cause of action for monetary damages, *Bivens* would have had no occasion to consult or discuss the action or inaction of Congress. Since the Court explicitly reasoned its precedent on the latter ground, we take the *Bivens* remedy to be one implied as a matter of federal common law<sup>8</sup> and therefore subject, like

6. See 403 U.S. at 396-97, 91 S.Ct. at 2005, 29 L.Ed.2d at 626-27, citing *J. I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423, 428 (1964) (federal securities laws); *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (action for abuse of process through misuse of statute governing Congress' subpoena power); *United States v. Gilman*, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954) (indemnity action by government under Federal Tort Claims Act); *United States v. Standard Oil Co.*, 332 U.S. 301, 311, 67 S.Ct. 1604, 1609-10, 91 L.Ed. 2067, 2073 (1947) (government sought implied remedy, based upon established common law action).

7. *Bivens* is cited in *Cort* to support the proposition that causes of action for damages should not be implied to govern matters "traditionally relegated to state law, in an area basically the concern of the States," 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36, and the proposition that where such actions have been implied, "there has generally been a clearly articulated federal right in the plaintiff," *id.* at 82, 95 S.Ct. at 2090, 45 L.Ed.2d at 39.

8. See *Kostka v. Hogg*, 560 F.2d 37, 44 & n.7 (1st Cir. 1977). See also *Rodriguez v. Ritchey*,

556 F.2d 1185, 1193-94 (5th Cir. 1977) (en banc). See generally *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 937 & n.14 (9th Cir. 1977); C. Wright, *Federal Courts* § 60 (3d ed. 1976), citing *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 465-75, 62 S.Ct. 676, 683-88, 86 L.Ed. 956, 966, 971 (1942) (Jackson, J., concurring):

Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law . . . . 315 U.S. at 472, 62 S.Ct. at 686, 86 L.Ed. at 969; Monaghan, Foreword: Constitutional Common Law, 89 Harv.L.Rev. 1, 10-13, 22-26 (1975).

Where a remedy is of constitutional dimensions and particular elements are not subject to revisions by Congressional legislation, the Court has clearly so indicated. See, e.g., *Jacobson v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1923).

all such law, to the power of Congress to alter or withdraw. Therefore, we employ a two-step analysis. First, we look to the jurisprudence of statutory implication to determine whether to imply a damage action of non-constitutional dimensions. Second, if this initial inquiry does not suggest that such an action should be implied, we must determine whether the Constitution nevertheless compels the existence of a remedy in damages to vindicate the rights asserted. See *Kostka v. Hogg*, 560 F.2d 37, 42 (1st Cir. 1977). Applying this analysis to Davis' claim, we find that the district court properly concluded that no cause of action existed.

[1] Courts have considered several factors in determining whether to imply a cause of action from a statutory right: (1) whether the provision asserted creates an especial right in the plaintiff, (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy, (3) whether implication of the remedy would be consistent with the purpose of the right asserted, and (4) whether the cause of action implied would be one appropriate for federal law. *Cort v. Ash*, 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36 (1975). Of course, the factors examined in questions of implied statutory causes of action, as set forth in *Cort* and preceding cases, cannot be applied in precisely the same way where implying a *Bivens*-type action is at issue. However, this circuit has held that the *Cort* factors do not set forth a rigid pattern of analysis that a court must follow precisely. Rather, "the Court simply said that several factors were relevant and worthy of consideration." *Olsen v. Shell Oil Co.*, 561 F.2d 1178, 1188 (5th Cir. 1977).

Where federal courts have inferred a federal private cause of action not expressly provided, there generally has been a clearly articulated federal right in the plaintiff. *Cort v. Ash*, 422 U.S. 66, 82, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26, 38 (1975), citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394-95, 91 S.Ct. 1999, 2003-04, 29 L.Ed.2d 619, 625-26 (1971). While the fifth amendment right to due process certainly confers a right upon Davis, the injury alleged here does not infringe this right as directly as the injury inflicted in the unreasonable search of Webster Bivens offended the fourth amendment. The concept of due process encompasses virtually all of the civil liberties derived from the Constitution. While the fifth amendment Due Process Clause surely exists for the "especial benefit" of Davis, as *Cort* required, it does not exist with equal certainty to protect her tenure in a non-competitive personal aide position statutorily denominated as service at will. 2 U.S.C.A. § 92

*Cort* looked to "legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36. *Bivens* recognized that congressional intent to create a remedy must guide a court in determining whether to imply a remedy from provisions of the Constitution. 403 U.S. at 396-97, 91 S.Ct. at 2004-05, 29 L.Ed.2d at 626-27. Congressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position. In Section 701, Title VII of the Civil Rights Act of 1964, Congress excluded the federal government from the general definition of "employer," thus denying federal employees a statutory damage action under Title VII. 42 U.S.C.A. § 2000e(b). In 1972, Congress amended Title VII to add Sec-

tion 717, which provided a separate administrative remedy for discrimination in federal employment, but did not extend the remedy to employees of Congress not in the competitive service. Under Section 717, other federal employees may have review in the federal courts of final action by their employing agencies or the Civil Service Board of Review, 42 U.S.C.A. § 2000e-16(a) (1974). Congressional action in designing Title VII remedies shows Congress adhered to the legislative judgment expressed in the statute under which Davis was hired: Members of a congressman's personal staff are removable by him "at any time . . . with or without cause." 2 U.S.C.A. § 92.

Implying the cause of action asserted by Davis would have the anomalous result of granting federal employees in non-competitive positions, whom Congress did not intend to protect, a remedy far more extensive than Congress adopted for federal employees in the competitive service, whom it did intend to protect. When Congress enacted Section 717, it believed that no other effective remedy existed for federal employees treated discriminatorily. See *Brown v. General Services Admin.*, 425 U.S. 820, 826-28, 96 S.Ct. 1961, 1965-66, 48 L.Ed.2d 402, 407-08 (1976); H.R.Rep.No. 92-238, 92d Cong. 2d Sess., [1972] U.S. Code Cong. & Admin. News, pp. 2137, 2160. However, in amending Title VII to make it the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination" for those federal employees

it covered,<sup>9</sup> Congress did not grant federal employees in the competitive service an action for damages against their superiors in their individual capacities.<sup>10</sup> The Supreme Court has upheld the exclusivity of Title VII as a remedy for federal employment discrimination against employees in the competitive service whom it covers. In *Brown*, the Court held that Congress could require federal employees alleging discrimination to seek relief solely within the confines of Title VII, a limitation which plaintiffs could not surmount by the simple expedient of putting a different label on the pleadings. 425 U.S. at 832, 96 S.Ct. at 1968, 48 L.Ed.2d at 411. Congress cannot have intended to deal more generously with those in Davis' position, from whom it deliberately withheld protection.

Cort calls for an examination of the consistency of a statutory cause of action with the statutory scheme enacted by Congress. 422 U.S. at 78, 84, 95 S.Ct. at 2088, 2090-91, 45 L.Ed.2d at 39. The Court in *Bivens* made an analogous inquiry in considering the particular difficulties presented in enforcing the guarantees of the fourth amendment. The fourth amendment has presented the Court with a series of remedial dilemmas, not encountered in other contexts, with which the Court has wrestled actively for over half a century. The amendment's subject matter is such that law enforcement officials, who necessarily make the searches and seizures it governs, are themselves the group most like-

9. 425 U.S. at 828, 96 S.Ct. at 1966, 48 L.Ed.2d at 408.

10. Section 717, 42 U.S.C.A. § 2000e-16(c) (1974), allows an employee or applicant aggrieved by final action or a failure to take final action on his administrative complaint to file a civil action under Section 706, 42 U.S.C.A. § 2000e-5 (1974), in which "the head of the

department, agency, or unit . . . shall be the defendant." However, under this section, federal defendants may be sued only in their official capacities, and not as individuals. See *Keele v. Hills*, 408 F.Supp. 386, 387 (N.D.Ga. 1975); see also *Jones v. Brennan*, 401 F.Supp. 622, 627 (N.D.Ga. 1975).

ly to be hostile to its barriers. This hostility of law enforcement officials to the restraint of the fourth amendment led the Court initially to adopt the exclusionary rule for federal cases, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and then to apply it to the states in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), when criminal actions and state law tort actions proffered as a substitute remedy in *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), showed themselves ineffective. However, the exclusionary rule—the remedy chosen to secure the right—also has proved less than satisfactory. See *Bivens v. Six Unknown Named Agents*, 403 U.S. at 411, 91 S.Ct. at 2012, 29 L.Ed.2d 635 (1971) (Burger, C. J., dissenting). Thus the Court continues to struggle for a just means for enforcing the fourth amendment. See *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Violations of fourth amendment rights occur in a well-defined setting familiar to the courts. The relationship is always one between law enforcement officials and citizens suspected of possessing evidence of crime. The context in which these violations may arise is sufficiently limited to allow the court to determine that an action for damages would be consistent with the purpose of the fourth amendment in future instances in which such an action might be invoked. The fifth amendment Due Process Clause presents no similarly focused remedial issue. To the contrary, the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable and that there is simply no way a court can judge whether this remedy will be appropriate for securing the right in future situations where some plaintiff might assert it.

The final factor considered in *Cort* is whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 84–85, 95 S.Ct. at 2088, 2091, 45 L.Ed.2d at 36, citing *Bivens v. Six Unknown Named Agents*, 403 U.S. at 394–95, 91 S.Ct. at 2003–04, 29 L.Ed.2d at 625–26. Under this factor we consider the effect that implying a remedy would have upon both state law and the federal judiciary. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477, 97 S.Ct. 1292, 1303, 51 L.Ed.2d 480, 494 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739–741, 95 S.Ct. 1917, 1927–28, 44 L.Ed.2d 539, 551–52 (1975). While the particular circumstances of the case at bar raise questions of federal rights in federal employment, adoption of the broad principle upon which the granting of relief to Davis hinges would expand federal jurisdiction into broad fields of law presently occupied by state court systems. Therefore, we properly consider this factor.

Adoption of Davis' interpretation of *Bivens* would project the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law because, by its nature, every tort deprives the victim of due process through unlawful appropriation of liberty or property or both. Indeed, logically, the expansive effect of such a holding would not end there. It also would extend federal jurisdiction to cover all state action tort claims, either under pendent jurisdiction, cf. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), or under a cause of action implied from the fourteenth amendment. The latter of



these state action claims would be cognizable without regard to diversity of citizenship, amount in controversy or other present statutory limitation. Because of the breadth of due process, a decision implying an action for money damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee. Thus, the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings looms far more ominously than in *Bivens*. 403 U.S. at 391 & n.4, 91 S.Ct. at 2002 & n.4, 29 L.Ed.2d at 623 & n.4.

Not only does this case fail to present special remedial difficulties analogous to those faced by the Court in dealing with the fourth amendment, but also Congress avoided creating an action for money damages for Congressional aides in non-competitive positions. Moreover, implying this damage action necessarily would draw into the federal judicial system a wide range of cases whose resolution Congress has not committed to the federal judiciary and whose resolution is better suited to courts of general jurisdiction. These special considerations, not present in *Bivens*, eliminate any question of our creating a remedial right under our federal common law powers. This conclusion does not end our inquiry, however, for we still must determine whether the Constitution nevertheless compels an action for money damages implied from the fifth amendment Due Process Clause.

[2] Therefore, we next consider whether, in this case, a damage action is indispensable to the effectuation of the fifth amendment Due Process Clause and thus beyond the power of Congress to preclude. *Cf. Kostka v. Hogg*, 560 F.2d at 44. We conclude that the proposed damage remedy is not constitu-

tionally compelled. Not every right that conceivably could be wedged within the literal breadth of due process demands federal protection through a cause of action for monetary damages. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court considered the reach of federal remedies where Congress, in 42 U.S.C.A. § 1983, expressly provided that violation of constitutional rights by one acting under color of state law would give rise to a cause of action for monetary damages. Even with an express statutory mandate to provide a federal damage action, the Court noted that "the range of interests protected by procedural due process is not infinite." 424 U.S. at 709, 96 S.Ct. at 1164, 47 L.Ed.2d at 418 (1976), *citing Board of Regents v. Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972). Here, we do not consider, as the Court did in *Paul*, what due process may encompass given an express statutory mandate to extend a cause of action for money damages to the full reach of the right. Rather, we consider the extent to which the Constitution requires that we countermand the clearly discernible will of Congress to create a cause of action where Congress declined to provide one. *Paul* thus teaches that we should restrain our reach far more than the Court did there.

Denying an implied cause of action for money damages does not render meaningless any constitutional rights of congressional employees. A plaintiff might still seek equitable relief where the employer remained in office, although congressional employees in the non-competitive service whose allegedly discriminating employers are not in office may be left without a remedy for sex discrimination in employment unless Congress re-

verses its present statutory stand.<sup>11</sup> Other due process wrongs would either continue to be remedied in traditional ways through tort actions in courts of appropriate general jurisdiction or through special statutory remedies provided by state legislatures or Congress. Admittedly, some not now covered would remain inactionable.

Another provision of the Constitution must also be considered. Our rejection of the broad principle asserted by Davis is premised upon much more than just another "floodgates" argument. The prospect here is of so crushing an already precariously overloaded federal judicial system as to render meaningless the power the Constitution vests in Congress under Article III, Section 1, of the Constitution to establish the jurisdictional ambits of the inferior courts it has created. We decline to hold that by implication the fifth amendment requires such an anomalous result.

[3] Given these consequences and our inability to construct a plausible measure for acceptable limits on the right of action Davis would have us imply to remedy the wrong alleged, we refuse to take even a first step down the slippery slope until the Supreme Court answers the open question of whether any such right should exist. Because no right of action may be implied from the Due Process Clause of the fifth amendment, the district court correctly ruled that no civil action for damages may be maintained here. Absent such a right of civil action, the district court cannot exercise jurisdiction under 28 U.S.C.A. § 1331(a),

which confers jurisdiction only for "civil actions wherein the matter in controversy . . . arises under the Constitution . . . of the United States." To the extent that *Weir* is inconsistent with this position, it is overruled. Our affirmance on the jurisdictional ground means we do not reach Davis' second contention. Therefore, we vacate the district court's decision on the ground that Passman's conduct in firing her did not violate the Constitution.

The judgment of the district court is  
**AFFIRMED IN PART, AND IN PART VACATED.**

JONES, Circuit Judge, specially concurring:

If there is a constitutional barrier against the exercise of the judicial power to decide the controversy between Mrs. Davis and Mr. Passman then, so I believe, that bar should be raised rather than denying relief because the Congress has failed to enact legislation providing a remedy.

I do not believe that the constitutional provisions here pertinent are to be confined to the Speech and Debate clause.<sup>1</sup> The broader provision by which all legislative powers are vested in the Congress<sup>2</sup> is relevant to this cause. It might be said that the doctrine of *inclusio unius est exclusio alterius* permits or requires a construction that a Congressman may be judicially questioned for any and all else that a Congressman might do in the exercise of the legislative power except in speech or debate. Obviously the Constitution has no such

11. Davis has not challenged the distinction in Title VII between federal employees in competitive positions and those in non-competitive positions for the purposes of Title VII remedies.

1. The Senators and Representatives . . . for any speech or debate in either House . . . shall not be questioned in any other place. U.S.Const. Art. I, § 6(1).

2. U.S.Const. Art. I, § 1.

meaning. We may remind ourselves of Chief Justice Marshall's reminder as to constitutional construction.<sup>3</sup>

In no small measure the genius of the Founding Fathers in framing that most wonderful work ever struck off by man<sup>4</sup> is the separation of powers among the three branches of government. Although the need for checks and balances requires that no one of the departments shall be wholly unrelated to each of the others<sup>5</sup> the essential functions of each are, by the terms of the instrument, separate from those of the others.<sup>6</sup>

Notwithstanding the *Gravel*<sup>7</sup> and *Brewster*<sup>8</sup> cases and Senator Ervin's critical comments upon them<sup>9</sup> the doctrine of separation of powers survives.

It is not necessary to say that all of the activities of the members of a Congressman's staff are legislative. It will not be said that they are not so in large measure. Their activities are as many and as varied as those of the members served by them. It has been well stated that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . ." *Gravel v. United States*, supra, 408 U.S. at 616-17, 92 S.Ct. at 2623.

It seems to me the court held that judicial relief is denied because the Congress has failed to provide a judicial

remedy. Rather I think the court should say that the hiring and firing of his "alter ego" is a legislative activity and a part of the exercise of the legislative power. The question is not one of whether there is a judicial remedy. The question, as I see it, is whether or not the controversy is one involving the exercise of the legislative power and within the jurisdiction of the Congress. Let it decide whether there should be absolute immunity. Let it determine whether there is a right and if so to fashion a remedy and designate a tribunal to declare and enforce it. I think it should have been held that the complaint does not state a claim upon which relief can be granted.

RONEY, Circuit Judge, concurring:

I concur in the result reached by the majority opinion, but I am constrained to articulate the difference I see between this case, in which I agree that plaintiff has no constitutional damage remedy based on an alleged fifth amendment violation, and the case of *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (*en banc*), in which I joined a dissent on the ground that plaintiff there could claim damages against federal officers for an alleged due process violation.

shall appoint federal judges and U.S. attorneys the reality is that "the Senate nominates and the President confirms persons to fill those offices." Griffin B. Bell, *Washington Post*, February 27, 1978.

3. "We must never forget that it is a constitution we are expounding." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819)
4. William E. Gladstone, 127 *North American Review* 179 (Sept.—Oct. 1878).
5. J. Madison, *The Federalist*, No. XLVIII (1852 ed.).
6. It may be appropriate to take note of a recent comment of the Attorney General that although the Constitution and statutes provide that the President shall nominate and by and with the advice and consent of the Senate

7. *United States v. Gravel*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).
8. *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).
9. Sam J. Ervin, Jr., *The Gravel and Brewster cases: An Assault on Congressional Independence*, 59 *Va.L.Rev.* 175 (1973).

In his concurring opinion in *Bivens*, Justice Harlan intimated that "the appropriateness of money damages may well vary with the nature of the personal interest asserted." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 408 n.9, 91 S.Ct. 1999, 2011, 29 L.Ed.2d 619, 634 (1971) (Harlan, J., concurring). The distinction I find between *Rodriguez* and the instant case lies in the nature of the personal interest asserted in the "due process" violations alleged. In *Rodriguez* the plaintiff was indicted, arrested, and held in bail for many months for a crime she knew nothing about and of which she was altogether innocent, because of the allegedly unconstitutional acts and conduct of a federal agent. In dissent, both Judges Coleman and Goldberg, with whom I concurred, held that plaintiff had a *Bivens*-type damage claim if the agent's acts were so reckless as to constitute a willful violation of the plaintiff's "right to remain free of unconstitutional intrusions by governmental agents." 556 F.2d at 1195.

To me, there is little distinction between the personal liberty invasion by arrest and indictment in *Rodriguez* and the personal liberty invasion by the private apartment search, seizure, and arrest in *Bivens*. Both cases involved the citizen's right to be let alone by Government agents, unless the agents act within the governmental powers ordained by the Constitution. The Constitution gave limited power to the Government it created. Without a constitutional base, no individual has the legal authority to act against another individual in the name of Government. Some governmental powers are specifically given, but to make absolutely sure that certain powers not given would not be read into the Constitution by overzealous Government officers, either executive, congressional,

or judicial, there is a list of "shall nots" in the Bill of Rights. Many of the individual rights enumerated there were neither "created" nor "given" by the Constitution, but rather were recognized as being inherent rights of individuals long before the summer of 1787. The framers' approach to those rights in the written Constitution was to try to assure they would remain forever free of governmental intrusion.

Such were the fundamental rights at stake in *Bivens* and *Rodriguez*. Even before the drafting of our Bill of Rights, plaintiffs *Bivens* and *Rodriguez* had an inherent right to be free from the type of intrusions they suffered. The constitutional amendments—in *Bivens*, the fourth, and in *Rodriguez*, the fifth—merely protected those rights by specific prohibition against encroachment. I saw *Rodriguez* as being controlled by *Bivens* and would have there held that the case law provided plaintiff *Rodriguez* with a damage remedy, a damage remedy rooted in preconstitutional notions of tort law.

In this case, however, no similar right is at stake. The defendant has not intruded upon a liberty interest with preconstitutional origins. Historically, employers had an inherent right to hire and fire whom they pleased, for whatever reason, arbitrarily, with no need to account to anyone for their actions, except perhaps to their conscience and their God, and for governmental employers, to their voters. This understanding of the employer-employee relationship prevailed when the Constitution was drafted and, indeed, formed the basis for decisions of the United States Supreme Court in this century. See *Adair v. United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908); *Coppage v. Kansas*,



236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915). Under this early theory, Ms. Davis had no right to be hired in the first place, and if hired, held her job subject to the whim of the individual who had the power to hire and fire.

But the Constitution has allegedly given her a right not to be fired on the basis of her sex. This right is not, however, a protected inherent right, but a right "created" by the Constitution, a right which in fact encroaches upon what was historically viewed as an inherent right of her employer.

Now the question is, Where does one find the roots for a damage remedy for a violation of this right so recently discovered in the recesses of the fifth amendment?

The dissenting opinion of Judge Goldberg repeatedly invokes the oft-quoted dictum that "where legal rights have been invaded, and a federal statute provides for a general right to sue for any such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939, 944 (1946), quoted in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). It is interesting to note, however, that the author of that statement, Justice Black, dissented in *Bivens* on the ground that "neither Congress nor the State of New York [had] enacted legislation creating . . . a right of action [for damages]." 403 U.S. at 428, 91 S.Ct. at 2020. (Black, J., dissenting).

The people, by both Constitution and statute, can and often do create rights for which they provide either no remedy or a restricted remedy for the violation thereof. In analyzing such rights, the courts are not entirely free to afford remedies which have not been provided

by the creator of the rights. Thus, to me, Judge Clark makes a necessary analysis to determine whether a damage remedy is rooted in the document which created the violated right. Here we find the relevance of the analysis provided in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). To me also, this is where I part from Judge Goldberg, with whom I joined in *Rodriguez*.

The majority opinion does not "cut back" on *Bivens*. The underlying facts and concept of *Bivens*, by themselves, simply do not cover the rights asserted in this case. The question, then, is not whether *Bivens* applies, but whether the courts will infer from the Constitution itself a damage remedy for the violation of the kind of due process right here claimed. For here, a damage remedy must be rooted in the document—the Constitution—which created the violated right, or a subsequent statute, since there is no preconstitutional source for it.

This gets down to the real difference between the majority and the dissent, in my view. *Bivens* can easily be grounded on the premise that courts may remedy the unlawful violation of constitutionally "protected" individual rights. But it will better satisfy the revered concept of Government "by the people" if the rights "created" by Constitution or statute are remedied in only those ways that can safely be inferred from the creating documents.

*Bivens*, which produced five separate opinions, was not an easy decision. Lower courts probably disserve the law by carrying obviously difficult, narrow, limited decisions of the Supreme Court far beyond their intended reach. Such judicial activity subverts a major objective of law in an organized society: to provide certainty for human action. The

majority of this Court has shown precisely the restraint required. If the people, through their elected officials, choose to provide the remedy sought here, so be it; but until then the courts, through their appointed judges, should not require it.

It is impossible to completely align the cases in such a way as to support the distinction made here between *Bivens* and *Rodriguez*, and this case. But so is it impossible to line up the cases to support any other logical *Bivens* premise. There is a bit of symmetry, however, if we look only at the facts of the cases, and the results, and disregard the verbalization of principles in the written opinions. In the purest sense, the facts and the result are the precedent from which *stare decisis* should flow anyway.

As the Supreme Court held in *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 90 L.Ed. 939 (1946) federal question jurisdiction, as opposed to a federally recognized right of relief, is created by the mere allegation of matters in controversy arising under the Constitution or laws of the United States. Most of the circuit court cases dealing with *Bivens*-type claims in constitutional areas other than the fourth amendment have decided only the federal jurisdiction question. Dicta aside, these cases have merely found allegations of constitutional violations to be sufficiently substantial to ground federal jurisdiction under 28 U.S.C.A § 1331. This is altogether different from inferring a *Bivens*-type damage remedy from the constitutional provisions asserted. See, e. g., *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976); *Lewis v. District of Columbia Dept. of Corrections*, 174 U.S.App.D.C. 483, 533 F.2d 710 (1976).

Indeed, the only cases cited by the dissent as extending *Bivens* beyond the fourth amendment to the due process

rights of discharged employees were not *Bivens* remedy cases. In *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977) the Second Circuit held that a claimed denial of due process by a discharged elementary school teacher stated a cause of action arising directly under the fourteenth amendment. On the question of remedies, however, the court stated: "Whether money damages are available under this cause of action or only equitable relief . . . is a question of remedies that we need not reach . . . ." *Id.* at 197 n.4 (citation omitted). Since the power of federal courts to grant equitable relief for violations of constitutional rights was recognized prior to *Bivens*, the *Gentile* court did not really advance the march of *Bivens* into the area of fifth amendment rights. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 400, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring); *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Likewise, in *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977) the Eighth Circuit held that a discharged city employee was entitled to monetary relief in the nature of backpay for violation of fourteenth amendment due process, but was careful to emphasize that it was discussing "only an equitable remedy . . . ." *Id.* at 933 n.9 and 940.

Cases in which circuit courts have inferred a *Bivens*-type damage remedy from constitutional amendments other than the fourth have varied widely in their facts, but have generally involved an intrusion into a liberty interest having preconstitutional origins. For example, the first amendment did not "create" the right to express one's views free from unlawful governmental intrusion; it merely protected an already present right from governmental interference.

*Dellums v. Powell*, 566 F.2d 167 (D.C. Cir.1977) (speakers and demonstrators unlawfully arrested by District of Columbia police during 1971 "May Day" demonstration have cause of action for damages arising directly under first amendment);

*Paton v. LaPrade*, 524 F.2d 863 [862] (3rd Cir. 1975) (Bivens-type damage remedy for violation of first amendment rights available to 16-year-old school student who was investigated by FBI after sending off for literature from Socialist Workers Party in connection with her social studies class); *Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975) (complaint alleging that because of anti-fluoridation speeches made by plaintiff, Department of Health, Education and Welfare coerced plaintiff's employer to fire him stated a Bivens-type damages action for violation of first amendment rights).

Nor did the due process clause of the fifth amendment "create" a right in the individual to be free from deprivation of liberty and property interests; it merely provided that government encroachment would be constitutional only if it followed the criteria therein provided.

*Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977) (allegation that certain zoning ordinances enacted by agency operating under federal law effectuated a "taking" of plaintiff's land states a Bivens-type damage claim arising directly under the fifth amendment);

*State[s] Marine Lines, Inc. v. Schultz*, [Shultz] 498 F.2d 1146 (4th Cir. 1974) (unlawful seizure of plaintiff's property by Customs agents gives rise to a Bivens-type damage action arising directly under fifth amendment);

*United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (allegations that FBI agents falsified documents and testified falsely in order to convict plaintiff state cause of action for damages arising directly under fifth amendment).

These fundamental rights, unlike the liberty interest asserted by Ms. Davis, are not "created" by the Constitution but are inherent in the individual, either absolutely "protected" by the framers from encroachment by the Government, or "protected" to the extent provided in the Constitution.

In sum, a claim for damages should not be foreclosed merely because it arises out of a fifth amendment violation, rather than a fourth, but should be considered on the basis of the personal interest asserted. The remedy sought for the personal interest asserted by Ms. Davis cannot be infused into the Constitution without unduly burdening the reasoning with the hope, faith, and personal preference of the reasoner. Therefore, I would affirm the district court.

GOLDBERG, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, joins, dissenting:

A majority of the en banc court today holds that no private cause of action for damages may be implied from the due process clause of the fifth amendment to the United States Constitution. I believe that this conclusion, certainly as it applies to the facts of this case, is untenable so long as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), is good law. Finding nothing in subsequent opinions of the Supreme Court which undercut the vitality of the reasoning in *Bivens*, I would hold that Shirley Davis has a private

right of action for damages to vindicate her constitutional rights. While recognizing that constitutional attrition may be the benchmark of the 1970's, I would leave it for the Supreme Court to place the mark of Cain on *Bivens'* heretofore unblemished brow. It is a source of deep regret that it is the Fifth Circuit, a court so often exemplary in its affirmation of constitutional rights, which has chosen to start *Bivens* down the slippery slope into desuetude and demise. I respectfully dissent.

# I.

In the early part of 1974 Shirley Davis was Deputy Administrative Assistant to Congressman Otto E. Passman of Louisiana's Fifth Congressional District. The Representative terminated Ms. Davis's employment, effective July 31, 1974. In his letter to her explaining the termination decision the Representative wrote, "You are able, energetic and a very hard worker. . . . [H]owever, on

account of the unusually heavy workload in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my administrative assistant be a man." The full text of this rather remarkable letter is set out below.<sup>1</sup>

Davis then filed this action against the Representative, claiming he had violated the equal protection component of the fifth amendment's due process clause. She invoked the court's "arising under" jurisdiction pursuant to 28 U.S.C. § 1331(a) and sought relief including, *inter alia*, damages from Passman in his individual capacity. The district court assumed jurisdiction of the case and proceeded to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), holding that "the discharge of plaintiff on alleged grounds of sex discrimination by defendant is not violative of the Fifth Amendment to the Constitution" and

# I. Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some

organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,  
/s/ Otto E. Passman  
Member of Congress



that "the law affords no private right of action to plaintiff therefor." A panel of this court reversed the decision of the district court and remanded the case for trial. 544 F.2d 865 (5th Cir. 1977). The panel concluded that taking the complaint's allegations as true, Representative Passman's dismissal of a staff member on the basis of gender violated the equal protection component of the fifth amendment due process clause; that under *Bivens* the Constitution itself affords the dismissed staff member a damages remedy; that sovereign immunity does not bar a damages award against the Representative individually; that the speech or debate clause does not extend to staff dismissals because they are not "legislative tasks" within the Supreme Court's holdings; and that the existence of qualified immunity cannot support the district court's dismissal of the complaint. See *id.* at 882.

Circuit Judge Jones dissented from the judgment of the panel on the basis of the doctrine of separation of powers. *Id.* Representative Passman, by then defeated in his bid for reelection and retired from the Congress, filed a petition for rehearing en banc, alleging that congressional hiring and firing were insulated from judicial review under the political question doctrine and the speech or debate clause. The court granted rehear-

ing en banc. Today, not reaching the thorny constitutional issues posed by the scope of congressional immunity under the speech or debate clause, the en banc majority determines that no right of action for damages may be implied from the fifth amendment due process clause. As I dissent from this holding, I necessarily must reach the other issues, including the applicability of the speech or debate clause, considered in the panel opinion. On those issues, I would adhere to the analysis explicated in the panel opinion; I confine my remarks here to the *Bivens* question. On *Bivens*, the thrusts of Judge Clark's opinion for the en banc majority merit defensive parries in response.

## II.

Only in one case has the Supreme Court directly confronted and decided the question whether a federal cause of action for damages may be implied directly from the United States Constitution: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).<sup>2</sup> Having created in that case "a policy of access,"<sup>3</sup> the Court has since chosen to refrain from possibly premature rigidification of the contours of the *Bivens* action,<sup>4</sup> in effect licensing the

2. Also worthy of mention is *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933) (founding right to recover just compensation directly on the fifth amendment; statutory recognition not necessary). Of course, it is clear "that there is an implied injunctive remedy for threatened or continuing constitutional violations." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718, 723 (2nd Cir. 1969), *rev'd on other grounds*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), citing *Bell v. Hood*, 327 U.S. 678, 684 and n. 4, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *Larson v. Domestic and Foreign*

*Commerce Corp.*, 337 U.S. 682, 696-97, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882). See also *Bivens*, *supra*, 403 U.S. at 400, 404, 91 S.Ct. at 2006, 2008, 29 L.Ed.2d at 628 (Harlan, J. concurring).

3. *Lehmann, "Bivens and its Progeny,"* 4 Hastings Const.L.Q. 531, 539 (1977).

4. See cases cited in majority opinion, *supra*, at n. 5.

lower federal courts to develop their own rules setting the parameters,<sup>5</sup> consistent with the mandate of *Bivens* itself, within which constitutional rights may be vindi-

cated by private damage actions. As noted by the en banc majority, few courts have held that *Bivens* actions are limited to fourth amendment claims.<sup>6</sup>

5. See Lehmann, *supra* n. 3, at 540, 604.

6. See majority opinion, *supra*, at p. —, slip op. at p. 3508. Apart from decisions in several circuits declining to imply causes of action against municipalities directly under the fourteenth amendment, in view of the exemption of municipalities from liability under 42 U.S.C. § 1983, *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977); *McDonald v. State of Illinois*, 557 F.2d 596, 604-05 (7th Cir.), cert. denied, — U.S. —, 98 S.Ct. 508, 54 L.Ed.2d 453 (1977); cf. *Mahone v. Waddle*, 564 F.2d 1018, 1022-25 (3rd Cir. 1977) (declining to imply a constitutional cause of action but finding an effective federal statutory remedy under § 1981), there appear to be no other decisions at the Court of Appeals level rejecting the availability of *Bivens* causes of actions under other constitutional amendments. Circuits founding causes of action directly on constitutional provisions other than the fourth amendment, or finding claims sufficiently substantial to ground jurisdiction on 28 U.S.C. § 1331, include the

D.C. Circuit: *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977) (first amendment, cause of action); *Payne v. Government of District of Columbia*, 559 F.2d 809, 818-19 (D.C. Cir. 1977) (fifth amendment, jurisdiction; favorable dicta on cause of action); *Lewis v. District of Columbia Department of Corrections*, 174 U.S.App.D.C. 483, 533 F.2d 710 (1976) (fifth amendment, jurisdiction); accord, *Greeny v. George Washington University*, 167 U.S.App.D.C. 379, 385, 512 F.2d 556, 562 n. 13, cert. denied, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975); *Apton v. Wilson*, 165 U.S.App.D.C. 22, 35, 506 F.2d 83, 96 (1974); *Cardinale v. Washington Technical Institute*, 163 U.S.App.D.C. 123, 128, 500 F.2d 791, 796 n. 5 (1974); *Sullivan v. Murphy*, 156 U.S.App.D.C. 28, 55, 478 F.2d 938, 965 and n. 47, cert. denied, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973) (fourth and fifth amendments, jurisdiction; favorable dicta on remedy).

Second Circuit: *Gentile v. Wilson*, 562 F.2d 193, 196-97 (2nd Cir. 1977) (fourteenth amendment due process, cause of action); accord, *Brault v. Town of Milton*, 527 F.2d 730, 734-35 (2nd Cir.), rev'd en banc on other grounds, 527 F.2d 736 (2nd Cir. 1975).

Third Circuit: *Paton v. La Prade*, 524 F.2d 862, 869-70 (3rd Cir. 1975) (first amendment, cause of action); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972) (fifth amendment, cause of action); *Gagliardi v. Flint*, 564 F.2d 112, 114-16 (3rd Cir. 1977) (fourteenth amendment, jurisdiction; reserving question of cause of action); *id.* at 117 (Gibbons, J. concurring) (cause of action). But see *Mahone v. Waddle*, *supra*.

Fourth Circuit: *States Marine Line, Inc. v. Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment, cause of action); cf. *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (thirteenth and fourteenth amendments, suggesting jurisdiction).

Fifth Circuit: *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976) (suggesting availability of cause of action under eighth amendment and/or fourteenth amendment due process, jurisdiction); *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976) (fifth amendment, jurisdiction); see also *Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n. 1 (5th Cir. 1975); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 801-02 and n. 2 (5th Cir. 1974); *Traylor v. City of Amarillo*, 492 F.2d 1156, 1157 n. 2 (5th Cir. 1974). But see *Rodriguez v. Ritchey*, 556 F.2d 1185, 1192 (5th Cir. 1977) (en banc) (declining to speak on *Bivens* issue).

Sixth Circuit: *Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975) (first amendment, cause of action; reasoning based on fifth amendment cases).

Seventh Circuit: *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 718-719 n. 7 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1518, 47 L.Ed.2d 768 (1976) (fourteenth amendment, suggesting availability of cause of action but denying relief); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), cert. denied, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976) (fourteenth amendment procedural due process, jurisdiction; favorable dicta); cf. *Cannon v. University of Chicago*, 559 F.2d 1063, 1082 (7th Cir. 1977) (dicta on availability of relief for violations of fundamental constitutional rights). But see *McDonald v. State of Illinois*, *supra*.

With respect to the due process clauses of the fifth and fourteenth amendments, the overwhelming weight of authority, particularly at the Court of Appeals level, holds that constitutional rights may be vindicated through implied causes of action for money damages.<sup>7</sup> And as the en banc majority is also aware, numerous panels of this circuit have adhered to *Bivens*' policy of access, finding jurisdic-

tion under 28 U.S.C. § 1331 for district courts to entertain implied causes of action for damages under the due process clauses of the fifth and fourteenth amendments.<sup>8</sup> Nevertheless, taking Ms. Davis' allegations as true, the en banc court today chooses to deny a right of action to the victim of as blatant a case of gender-based discrimination as is within my experience on this court.<sup>9</sup>

Eighth Circuit: *Owen v. City of Independence*, 560 F.2d 925 (8th Cir. 1977) (fourteenth amendment due process, cause of action for monetary relief in the nature of backpay against a municipality); *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 76 (8th Cir.), cert. denied, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976) (finding no infringement of fair trial, privacy rights; assuming without deciding availability of *Bivens* cause of action); *Wounded Knee Legal Defense/Offense Committee v. F.B.I.*, 507 F.2d 1281, 1284 (8th Cir. 1974) (sixth amendment right to effective assistance of counsel, jurisdiction).

Ninth Circuit: *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928, 936, 941-42 (9th Cir. 1977) (separate causes of action available under fifth amendment due process clause and fifth amendment just compensation clause); *Bennett v. Campbell*, 564 F.2d 329, 331-32 (9th Cir. 1977) (reversing denial of motion to amend complaint in order to permit assertion of *Bivens* claims under fourth and fifth amendments; suggesting the availability of damage actions for deprivations "of constitutional rights"); *Mark v. Groff*, 521 F.2d 1376, 1378 and n. 1 (9th Cir. 1975) (fifth, sixth and eighth amendments, jurisdiction; reserving question of remedy); cf. *Gray v. Union County Intermediate Education District*, 520 F.2d 803, 805 (9th Cir. 1975) (finding no denial of rights; apparently assuming availability of cause of action for backpay and damages for violation of first amendment and due process rights).

Tenth Circuit: *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975) (equal protection and due process, jurisdiction; favorable dicta on cause of action); *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976) (first, fourth, fifth, and ninth amendments; finding jurisdiction but denying relief on vicarious liability claim).

District court cases are collected in Lehmann, *supra* n. 3, at 566-68 and nn. 226-229.

Thus, seven circuits have implied causes of action directly from constitutional amendments other than the fourth. Of these, five circuits have implied causes of action from the due process clauses of the fifth and fourteenth amendments. In addition to these five, at least three circuits have found *Bivens* claims under the due process clauses sufficiently substantial to ground federal jurisdiction under 28 U.S.C. § 1331 and have commented favorably upon implication of damage actions from these clauses. Still another circuit, in implying a cause of action under the first amendment, has relied on cases implying causes of action from the fifth amendment. Today the Fifth Circuit becomes the first circuit to reject definitively the availability of a *Bivens* cause of action in any context other than a fourteenth amendment action against a municipality.

7. See cases cited in majority opinion, *supra*, at n. 4, and note 6 *supra*.

8. See majority opinion, *supra*, at p. —, slip op. at p. 3509, and cases cited therein.

9. Gender-based discrimination may violate the due process clause of the fifth amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975), quoting *Schneider v. Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964). See also *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Wiesenfeld*, *supra* (citations omitted).

Would that the Fifth Circuit had instead chosen to add one more jewel to its liberating diadem of pioneering jurisprudence. Still, the en banc court is correct in noting that despite the overwhelming weight of authority, choice is not foreclosed. The Supreme Court has invited judicial creativity, and Judge Clark, with his customary care and acuity, has authored as persuasive a rebuttal of this authority as might be imagined. Yet I remain unpersuaded. The test is *Bivens*. I offer here a reading of that case which I believe to be more consistent with its holding and more harmonious with its spirit than the reading offered by the majority.

### III.

If I understand the majority's treatment of *Bivens*, the crux of its reasoning is that the Supreme Court was able to imply a damages remedy for violation of the fourth amendment by federal officers only because Congress had not spoken. The Supreme Court's indication of a possible willingness to accord some deference to an "explicit congressional declaration" of preference for an alternative remedy "equally effective in the view of Congress," *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005, is apparently taken to mean that a cause of action for damages is not "part and parcel of the underlying constitutional right," therefore "is not wholly of constitutional dimensions," and thus is "subject to the will of the Congress for the substitution of other remedies, so long as the minimum demands of the Constitution are met." (Emphasis added). Majority opinion, *supra*, at pp. ———, slip op. at pp. 3510–3511.

What follows from this perspective is that the implication of a cause of action from the Constitution is initially to be

governed, or at least guided, by the standards applicable to implication of remedies from statutory enactments, as elucidated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Only if a cause of action for damages satisfies these statutory standards, or if "a damage action is indispensable to the effectuation of the fifth amendment," (emphasis added), majority opinion, *supra* at p. ———, slip op. at p. 3514, may a damage remedy be implied.

I believe that proper application of the *Cort* analysis to a constitutional claim would justify implication of a damages remedy directly from the fifth amendment on the facts of this case. But my disagreement with the majority is a more fundamental one: I believe the premises underlying the analytic structure proposed by the majority are irreconcilable with the Supreme Court's opinion in *Bivens*.

In my view *Bivens* is a decision of constitutional magnitude. The fundamental inquiry in *Bivens* was whether the Constitution mandates *some* remedy for a petitioner whose constitutional rights have been violated. Only after finding that *some* remedy is constitutionally compelled did the Supreme Court go on to consider which remedy is *appropriate*—not necessary in itself—in the circumstances of a given case to redress the constitutional violation:

[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by



virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

403 U.S. at 392, 91 S.Ct. at 2002, citing, *inter alia*, *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). The Constitution creates a right in the plaintiff; the courts are to adjust their remedies to accord relief.

That the fourth amendment might be enforced by other plaintiffs, in other contexts, through mechanisms other than a damage action, was passed over by the *Bivens* majority as of little moment. What was significant to the Court was the remedial plight of the petitioner in the case before it. As stated by Justice Harlan, concurring:

[I]t is apparent that some form of damages is the only possible remedy for someone in *Bivens*' alleged position. . . . [A]ssuming *Bivens*' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in *Bivens*' shoes, it is damages or nothing.

*Id.* at 409–10, 91 S.Ct. at 2011–12. On the need to provide an effective remedy, the Court was unequivocal:

[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for any such invasion, federal courts may use any available remedy to make good the wrong done.

10. This assumption is speculative on the basis of *Bivens* itself. See Harlan, J., concurring: I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today au-

*Id.* at 396, 91 S.Ct. at 2004, citing *Bell v. Hood*, 327 U.S. at 684, 66 S.Ct. at 777. In this respect, provision of a damage remedy "should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395, 91 S.Ct. at 2004 (citations omitted).

The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his [constitutional] rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

*Id.* at 397, 91 S.Ct. at 2005 (citations omitted). Responding to the suggestion that a more stringent test should govern the grant of damages in constitutional cases, Justice Harlan stated:

These arguments . . . seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.

*Id.* at 407, 91 S.Ct. at 2010 (concurring opinion) (footnote omitted).

The en banc majority's apparent conclusion that the *Bivens* damage action is of non-constitutional dimensions seems to be tied to its assumption<sup>10</sup> that a cause of action not "part and parcel of the underlying constitutional right" is merely federal common law of less than constitutional dimensions. But to state that the Court may accord some deference to a congressional choice of remedy "equally effective in the view of Con-

thorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

*Id.* at 407 n. 7, 91 S.Ct. at 2010.

gress" is only to admit the possibility of substitutes for the damage remedy, not to say that Congress may eliminate all means of vindication of a federal constitutional right.<sup>11</sup> Had Congress chosen to provide a remedy alternative to money damages to those "in Davis' shoes," this court would be correct in according that choice deference, though even in those circumstances,

[t]he ultimate determination of whether a remedial scheme appropriately effectuates the mandate of the Constitution is, of course, to be made by the Court as an exercise of constitutional judicial review.<sup>12</sup>

Perhaps the clearest statement by the Supreme Court itself on this subject is found in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966):

Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts.

11. Professor Dellinger suggests that the passage in *Bivens* finding no "explicit congressional declaration" and rejecting "formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment," 403 U.S. at 397, 91 S.Ct. at 2005, might be read

"affirmatively . . . to describe the conditions under which the Court should defer to congressional judgment even though a remedy may be substantively bound to constitutional provisions."

Dellinger, "Of Rights and Remedies: The Constitution as a Sword," 85 Harv.L.Rev. 1532, 1548 n. 89 (1972). Thus, where these conditions have not been met—where Congress has not provided an effective alternative remedy—there is no occasion for deference to congress-

Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

*Id.* at 490-91, 86 S.Ct. at 1636.

The opinion of the en banc majority totally fails to address the core inquiry commanded by *Bivens*. Apart from a passing reference not applicable to the plight of Ms. Davis that "[a] plaintiff might still seek equitable relief where the employer remained in office," majority opinion, *supra*, at p. —, slip op. at p. 3514, the en banc court nowhere considers whether some remedy must be available to vindicate fifth amendment rights. Where is the sensitivity that moved Justice Harlan to observe "For people in *Bivens*' shoes, it is damages or nothing"? 403 U.S. at 410, 91 S.Ct. at 2012. The majority essentially ignores the constitutional predicate for the *Bivens* decision, i. e., that there be a remedy, and reformulates the inquiry in a far more stringent fashion: a cause of action for damages will be implied only if damages, specifically, are in some absolute sense necessary to effectuate the constitutional mandate. The court then proceeds to find a damage remedy un-

sional judgment. The courts must therefore "adjust their remedies so as to grant the necessary relief." 403 U.S. at 392, 91 S.Ct. at 2002, quoting *Bell v. Hood*.

12. Dellinger, *supra* n. 11. I find nothing in Professor Monaghan's provocative article, cited by the majority, inconsistent with this conclusion. Monaghan, "Foreward: Constitutional Common Law," 89 Harv.L.Rev. 1 (1975): "I think that *Bivens* is an explicit recognition that the constitutional guarantee embraces a right of action . . . which is enforceable by any appropriate remedy including damages . . ." *Id.* at 24 n. 125. See generally Cox, "The Role of Congress in Constitutional Determinations," 40 Cincinnati L.Rev. 199, 247-261 (1971); Burt, "Miranda and Title II: A Morgantic Marriage," 1969 Sup.Ct.Rev. 81.

necessary while simultaneously acknowledging that constitutional deprivations of the sort suffered by Ms. Davis "would remain inactionable," and that Ms. Davis "may be left without a remedy for sex discrimination in employment" unless Congress chooses to create one. Majority opinion, *supra*, at p. —, slip op. at p. 3514.

In short, the majority opinion errs because it answers the wrong question. If Congress had provided an alternative remedy and explicitly excluded a remedy in damages, the appropriate inquiry would indeed be whether a damage remedy as such is necessary, nevertheless, to effectuate the constitutional guarantee, and therefore constitutionally required. But where, as here, *no* alternative remedy has been made available, that inquiry is simply irrelevant. In leaving Ms. Davis without any remedy, the majority's approach seems to me an utter negation of *Bivens* in both letter and spirit.

A further result of the majority's analytic approach is that its opinion never comes to terms with the appropriateness of a remedy in damages as opposed to alternative remedial devices which the court might make available. The majority's unelaborated suggestion of "equitable relief" is oblivious to those constitutional values, critically implicated in this case, underlying the speech or debate clause and the doctrine of separation of powers. Congress has spoken specifically to its views on the nature of the working relationship between Congressmen and their personal staffs by classifying employees like Ms. Davis as removable "at any time . . . with or without cause." The Supreme Court has accorded congressional staffers speech or debate clause protections in certain cir-

cumstances, recognizing that staffers may act as congressional alter egos in the performance of certain legislative tasks. *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). See *Davis v. Passman*, 544 F.2d at 877-81 (panel opinion). Apparently the majority feels these values can be better effectuated, consistent with the requirements of the fifth amendment, not by actions for damages but by injunctive orders requiring Congressmen to employ particular individuals. This is not the occasion for a definitive statement on the circumstances which might justify implication of a private action for equitable relief to vindicate fifth amendment rights.<sup>13</sup> But on the facts of the case before us, I would have thought that such "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396, 91 S.Ct. at 2005, are more germane to the implication of equitable relief than to implication of an action for damages.

Similarly, it would seem to me that the special problems of congressional immunity under the speech or debate clause and the doctrine of separation of powers render this case uniquely appropriate for adjudication in the federal courts under a federal cause of action. Much of the *Bivens* opinion concerns the difficulties and inadequacies of state court or state law adjudications of federal immunities in the context of constitutional claims; that reasoning is, if anything, even more powerful with respect to the issues presented here.

The majority's abiding fear seems to be "the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceed-

13. See, e. g., *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 1965

and n. 7, 48 L.Ed.2d 402 (1976), and note 2 *supra*.

ings" <sup>14</sup> by "project[ing] the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law . . . ." and "extend[ing] federal jurisdiction to cover all state action tort claims . . . without regard to diversity of citizenship, amount in controversy or other present statutory limitation." Majority opinion, *supra*, at pp. ———, slip op. at pp. 3514–3515. The majority refuses "to take even a first step down the slippery slope," "[g]iven these consequences and our inability to construct a plausible measure of acceptable limits on the right of action Davis would have us imply to remedy the wrong alleged . . . ." *Id.* at p. ———, slip op. at p. 3515. A like contention was raised in *Bivens*. Justice Harlan had this response:

[T]he question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interest of stockholders defrauded by misleading proxies. See *J. I. Case Co. v. Borak*, *supra*. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. at 410–11, 91 S.Ct. at 2012 (concurring opinion). Even on the majority's own premises, I am considerably more confident in the ability of courts to discern, in a careful and focused manner attentive to the facts of the case before them, when the pendulum has swung too far and how its course may be corrected. I do not believe that the majority's approach to the facts of this case is such a focused inquiry; nor do I believe the pendulum has swung too far here. We have before us no illusory or fabricated procedural due process claim which raises the specter of wholesale importation of traditional state tort law actions into the federal courts, but a discrete claim of discrimination on the basis of gender in violation of the equal protection guarantees of the federal Constitution, in a context particularly appropriate to adjudication in a federal forum. This is precisely the sort of case mete for judicial determination and susceptible to the application of traditional judicial standards.

The majority's invocation of the twin horsemen of the contemporary judicial apocalypse, the floodgate and the slippery slope, and its refusal to act in the spirit of *Bivens* "until the Supreme Court answers the open question," majority opinion, *supra*, at p. ———, slip op. at p. 3515, seem to me not an example of judicial restraint but of judicial abdication. I would prefer the approach taken by the *Bivens* majority in its quotation of one of the fundamentals of our constitutional jurisprudence:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,

14. The majority never indicates how Ms. Davis' claim might be "otherwise redressable in state courts or administrative proceedings."



403 U.S. at 397, 91 S.Ct. at 2005, *quoting* *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 163, 2 L.Ed. 60 (1803), and by the Fourth Circuit in extending *Bivens* to fifth amendment due process claims:

The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives.

*States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1157 (4th Cir. 1974).

I had not thought the fifth amendment was lodged behind an iron curtain, separating it from the rest of our constitutional protections. That the windows may open wide and the winds of freedom sweep through is no reason for rejecting the Davis claim. Are we to develop a calculus of constitutional access, granting rights to one out of seven persons deprived, one out of two, one out of a thousand, in order to control our docket? One wonders what would have happened had such constitutional parsimony pervaded our history. Hopefully the courthouse door, too often closed in recent years, will soon swing open again, and liberty shall ring forth once more from the halls of justice.

#### IV.

Much of the majority's discussion is devoted to an analysis of the *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) factors governing implication of causes of action from federal

statutes. I have already indicated why this analysis seems somewhat beside the point given the constitutional mandate that *some* remedy be available to vindicate constitutional rights. Given that the court has adopted this approach, however, it is incumbent on me to respond to the majority's application of the *Cort* criteria.

I note initially that the majority makes no attempt in its *Cort* analysis to assess the relevance of the fact that Ms. Davis is seeking to vindicate a right granted by the Constitution itself, and thus beyond the ability of Congress to eliminate, rather than a statutory right of the sort Congress giveth and may take away. While recognizing that the *Cort* statutory analysis "cannot be applied [to the Constitution] in precisely the same way," the majority is content to proceed on the basis of a prior statement by this court (in a statutory case) that the *Cort* "factors [are] relevant and worthy of consideration." Majority opinion, *supra*, at p. —, slip op. at p. 3511, *quoting* *Olsen v. Shell Oil Co.*, 561 F.2d 1178, 1188 (5th Cir. 1977).

I think it is possible to do better. By recognizing the constitutional context within which it is here applied, the *Cort* v. *Ash* style of analysis may be turned to productive use in the sphere of constitutional common law. Properly applied, the *Cort* factors may serve to illuminate the choice of an appropriate remedial mechanism to vindicate constitutional rights. *Cort* thus guides the determination, not of *whether* to imply *any* remedy, but of *which* remedy it is appropriate to recognize. I believe that such a contextually sensitive application of the *Cort* criteria supports the panel decision in this case, and it is with this perspec-

tive that I turn to the majority's *Cort* analysis.<sup>15</sup>

In *Cort v. Ash*, the relevant portion of which concerns whether a corporate stockholder may secure derivative damage relief from corporate directors under 18 U.S.C. § 610 for corporate violations of the federal election campaign laws, the Supreme Court declined to imply a private cause of action for damages because

implication of such a federal cause of action is not suggested by the legislative context of § 610 or required to accomplish Congress' purposes in enacting the statute.

422 U.S. at 69, 95 S.Ct. at 2084. The Court articulated four factors to guide its analysis in reaching this conclusion. The first factor has been central to all implication cases, from the first statutory implication decision in which it was originally formulated, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916), through to *Bivens* and more recent statutory cases: "is the plaintiff 'one of the class for whose especial benefit the statute was enacted,'

... that is, does the statute create a federal right in favor of the plaintiff?" 422 U.S. at 78, 95 S.Ct. at 2088, citing *Rigsby*, *supra*, 241 U.S. at 39, 36 S.Ct. 482. As the Supreme Court explained, "in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal

right in the plaintiff," citing *Bivens*, "or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard." 422 U.S. at 82, 95 S.Ct. at 2090 (citation omitted).

The en banc opinion in the instant case appears to acknowledge that "the fifth amendment right to due process certainly confers a right upon Davis." Majority opinion, *supra*, at p. —, slip op. at p. 3511. There can be no suggestion that the fifth amendment's protection of Davis is "at best a subsidiary purpose" of the constitutional guarantee. *Cf. Cort, id.*, at 80, 95 S.Ct. at 2089. With respect to this first, and I think predominant, factor, that is all that *Cort* requires. Nor is more required by *Bivens*. That decision was explicit in the role of the fourth amendment:

It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.

403 U.S. at 392, 91 S.Ct. at 2002.

I cannot understand why the equal protection component of the fifth amendment due process clause does not equally guarantee to all citizens of the United States, including Ms. Davis, the absolute right to be free from unconstitutional job discrimination on the basis of sex carried out by virtue of federal authority.<sup>16</sup>

15. I recognize that the majority's analysis proceeds from a different perspective. Were the fifth amendment simply a statutory enactment, there can be no doubt that a congressional determination to deny a private right of action for damages would be decisive under *Cort*. That conclusion, to the extent it embodies the majority's analytic approach, seems to me quite unshakeable but thoroughly irrelevant to this case.

16. It is frankly beyond my ken to understand first, the source of the majority's imputation of an additional hurdle of some degree of required specificity, or second, how the equal protection component of the fifth amendment is in this respect less specific than the fourth amendment. See majority opinion, *supra*, at p. —, slip op. at p. 3511.

It is with respect to *Cort's* second factor, "legislative intent, explicit or implicit, either to create such a remedy or to deny one", 422 U.S. at 78, 95 S.Ct. at 2088, that my disagreement with the majority is at its sharpest. In *Cort*, as in other statutory implication cases, the underlying premise is that Congress may explicitly create or deny a private remedy; what Congress gives, it may take away. There is no underlying right which is constitutionally inviolate. In a statutory case, therefore, the implication question is whether congressional intent to create or deny a remedy is best effectuated by judicial implication of a cause of action. Correspondingly, the en banc majority seems to read *Bivens* as "recogniz[ing] that congressional intent to create a remedy must guide a court in determining whether to imply a remedy from provisions of the Constitution." (Emphasis added). Majority opinion, *supra*, at p. —, slip op. at p. 3511. I find no such recognition in *Bivens* and believe this reading, as applied by the majority to deny Ms. Davis any remedial mechanism, is simply irreconcilable with *Bivens*. As pointed out in Section III of this dissent, the *Bivens* Court addresses the relevance of congressional action only after it has determined that some means of redress is constitutionally mandated; the voice of Congress is relevant, if at all, only in guiding the court in its determination as to whether damages provide an appropriate remedy. There is no suggestion in *Bivens* that Congress can negate the existence of every remedy which might vindicate a constitutional right, only an indication that the Court might accord some deference to an "explicit congressional declaration that persons injured by a federal officer's violation" of a constitutional right "may not recover money damages from the agents, but must instead be remitted to

another remedy, equally effective in the view of Congress." 403 U.S. at 397, 91 S.Ct. at 2005.

The en banc majority does not—and cannot—state that Congress has provided such an alternative remedy. Instead, the court tries to draw support for its position from the fact that "Congressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position." Majority opinion, *supra*, at p. —, slip op. at p. 3511. Here the confusion between constitutional and statutory implication is most evident. Given the constitutional mandate for some effective remedy, the second *Cort* factor, legislative intent to deny any remedy, is simply irrelevant to this case. See Dellinger, *supra* n. 11, at 1548-49.

Much the same criticism can be levelled against the en banc majority's application of the third *Cort* criterion, consistency with the underlying purposes of the legislative scheme. The majority correctly notes that Congress, in providing statutory relief from employment discrimination under Title VII for employees in the private sector and in other spheres of government service, see majority opinion, *supra*, at pp. — — —, slip op. at pp. 3511-3512, has carefully avoided furnishing relief of any sort to many of its own employees. By providing an administrative—judicial mechanism for ensuring the rights of covered employees, Title VII may well constitute "an explicit congressional declaration" that covered employees "must be remitted to another remedy, equally effective in the view of Congress." Indeed, the Supreme Court has held that for federal employees covered by the complex and systematic remedial scheme of Title VII, that statute provides the exclusive judi-

cial remedy. *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976).<sup>17</sup> Nothing similar can be said about congressional employees in the position of, Ms. Davis, who are statutorily excluded from the coverage of Title VII. Congress has provided no remedial mechanism for them. Such employees are in no sense bound up in the statutory system of protections created by Congress, and I cannot perceive how according Davis a vehicle to enforce her constitutional rights would detract from or be inconsistent with the operation of the statutory scheme within the sphere of its application. I am also hard put to understand the en banc majority's suggestion that a constitutional cause of action would "deal more generously with those in Davis' position," majority opinion, *supra*, at p. —, slip op. at p. 3512, than covered federal employees are dealt with under Title VII. It is true that if accorded a *Bivens* action, Davis could sue Representative Passman for damages in his individual capacity, while

a Title VII plaintiff could not. But Title VII, for those to whom it applies, lowers the bar of sovereign immunity to permit a back pay award, together with possible equitable relief, directly against the United States. It also affords the possibility of relatively quick and inexpensive relief at the administrative level. This seems to me no less favorable than a possible recovery against a former congressman. It is unnecessary to speculate here on whether extension of Title VII to currently non-covered congressional employees would be the most appropriate mechanism for protection of constitutional rights or whether a remedial mechanism more carefully tailored to the particularities of congressional employment relationships would be preferable; I note only that Congress has done neither.<sup>18</sup> In these circumstances, the problem confronting us is precisely analogous to that before the *Bivens* court, and the response should be the same, to make available "a particular remedial mecha-

17. In *Brown*, the Court did not reach the constitutional issue of whether, absent the applicability of Title VII or an alternative statutory remedy, federal employees would be without any means to redress discriminatory treatment "that backpay or other compensatory relief," *id.* at 826, 96 S.Ct. at 1965; it merely noted, based on legislative history, that Congress desired a remedy to be available and reasonably perceived an absence of effective remedies then (in 1972) in existence. The two cases cited by the Court as substantiating the reasonableness of Congress' perception, *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934, 90 S.Ct. 941, 25 L.Ed.2d 115 (1970), and *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971), both denying the availability of damages, were decided prior to the Supreme Court's seminal decision in *Bivens*. Obviously, nothing in *Brown* determines that Congress may negate the existence of a cause of action to vindicate a constitutional right without providing an alternative and equally effective remedy. See *Davis v. Pass-*

*man*, 544 F.2d at 874-76 (panel opinion). Congress did provide an acceptable alternative for those employees covered by Title VII. It provided nothing for Ms. Davis or those in her position.

18. The choice properly before this court is one between alternative remedies. No party before us has suggested that we undertake to fashion a remedy precisely analogous to that provided by Title VII, if indeed such a remedy is within our judicial power. While this court may, and should, consider congressional policies in choosing the appropriate remedy, we should not refrain from adopting such judicial remedies as are available and meaningful to the plaintiff merely because Congress has adopted a constitutionally sufficient but different remedial scheme for other employees. It is no answer that the only available judicial remedy might be more favorable than the remedy fashioned by Congress if the only alternative to a more favorable remedy is no remedy at all.



nism normally available in the federal courts,"

403 U.S. at 397, 91 S.Ct. at 2005, recalling that

where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

403 U.S. at 392, 91 S.Ct. at 2002, *quoting* *Bell v. Hood*, 327 U.S. at 684, 66 S.Ct. 773. For ours is the "particular responsibility to assure the vindication of constitutional interests . . ." 403 U.S. at 407, 91 S.Ct. at 2010 (Harlan, J., concurring).

I am also unpersuaded by the majority's suggestion that while fourth amendment violations "occur in a well-defined setting familiar to the courts,"<sup>18a</sup> damage remedies for due process violations in general, and equal protection claims in particular, are somehow not "judicially manageable." See majority opinion, *supra*, at p. —, slip op. at pp. 3512–3513. As the Court observed in *Bivens*, "[h]istorically, damages have been re-

garded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395, 91 S.Ct. at 2004 (citations omitted). I have little doubt that the experience of judges in dealing with employment discrimination claims "supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion" of equal protection rights of the sort asserted here. *Cf.* 403 U.S. at 409, 91 S.Ct. at 2011 (Harlan, J. concurring). The en banc court's analysis of this factor, to the extent it is not reducible to another floodgates argument, seems to me an argument against the validity of *any* means of vindication of equal protection rights, not simply against the choice of damages as an appropriate remedial mechanism. With respect to this factor as well as the preceding one, the en banc majority's mechanical application of the *Cort* statutory criteria as somehow "relevant and worthy of consideration" fails to consider the distinctive features of implication of rights di-

18a. The majority apparently also finds, in *Bivens*' responsiveness to "the particular difficulties presented in enforcing the guarantees of the fourth amendment," in particular, the "hostility of law enforcement officials to the restraints of the fourth amendment," majority opinion, *supra*, at p. —, slip op. at pp. 3512–3513, something akin to this third *Cort* factor. The inference the majority draws from this discovery, apparently that the *Bivens* action is uniquely necessary in the fourth amendment context, is one I am unable to follow. For what seems to me decisive in *Bivens* is the fact that whatever remedies were available to others whose fourth amendment rights had been violated, such remedies were meaningless to *Bivens* himself; thus, the existence of those other remedies was irrelevant to the Court in its decision to create a cause of action to vindicate the rights of the plaintiff in the case before it. Accordingly, there is no need to

speculate on the comparative hostility of law enforcement officials to the restraints of the fourth amendment and of Congressmen to the possibility of being answerable in damages for violation of their employees' equal protection rights.

In this respect, it is worth noting that an *amicus* brief was submitted in this case by signatories of the House Fair Employment Practices Agreement, including both Members of Congress and congressional employees. That Agreement provides, *inter alia*, that the signatories will not discriminate against an employee or applicant for employment on the basis of sex. *Amici* "see absolutely no harm to the legislative process if Members of Congress are required to conform to constitutional standards when dealing with their employees." *Amicus* Brief at p. 3. See also 5 U.S.C. § 7151.

rectly from the Constitution and comes to a result contrary to that commanded by *Bivens*.

This is also regrettably true in the court's application of the fourth and final *Cort* factor, whether "the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 95 S.Ct. at 2088. The en banc majority's apparent conclusion that this is an apt characterization of a claim by a congressional employee working in a congressional office building alleging sex discrimination violative of the fifth amendment to the United States Constitution by a member of Congress seems to me a novel view of the operation of "Our Federalism." The majority, intent on avoiding the horrors, real or imagined, of a flood of procedural due process claims carrying along traditional state tort actions, here as elsewhere never comes to consider the facts of the case before it.<sup>19</sup>

Nor is this case in any sense an attempt to end-run possible statutory limitations of § 1983, unlike the only two Court of Appeals cases cited by the en banc majority as declining to imply *Bivens* actions from the due process clauses. See majority opinion, *supra*, at n. 4.

19. The en banc majority quotes *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), to the effect that "the range of interests protected by procedural due process is not infinite." *Id.* at 709, 96 S.Ct. at 1164, quoting *Board of Regents v. Roth*, 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). *Paul*, of course, rejected "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701, 96 S.Ct. at 1161 (emphasis added). Without engaging in

In *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977), the First Circuit refused to imply a right of action for vicarious liability against a municipality under the fourteenth amendment in the teeth of Supreme Court decisions foreclosing municipal liability under § 1983. In distinguishing the result in *Bivens* the *Kostka* court noted that the plaintiffs before it "here have available to them a right of action which is measured by constitutional standards: § 1983," *Id.* at 42, and resisted the attempt to impose vicarious liability on a municipal "deep pocket defendant", *id.* at 41, given "something akin to an explicit Congressional determination that political subdivisions are not to be held liable in damages" when "municipal employees violate individuals' constitutional rights." *Id.* at 43. The court suggested that "the existence of a statutory remedy which is designed to implement the constitutional guarantee may itself render the *Bivens* analysis inappropriate," *id.* at 42, and made the precise inquiry which the majority refuses to make here: "We cannot say that the remedial scheme enacted by Congress—permitting damages recoveries under limited circumstances and injunctive relief whenever there has been a sufficient prior threat of harm—does not adequately implement the constitutional guarantees, at least in cases in which

any polemical discussion about the wider implications of *Paul*, we note first, that Ms. Davis' damages include a loss of employment; second, that her claim is bottomed on equal protection and not on procedural due process; and third, that vindication of Ms. Davis' fifth amendment claim is in no way inconsistent with the Court's observation in *Paul* that the fourteenth amendment "did not alter the basic relation between the States and the national government." *Id.* at 700, 96 S.Ct. at 1160, quoting *Screws v. United States*, 325 U.S. 91, 108-09, 65 S.Ct. 1031, 1039, 89 L.Ed. 1495 (1945).

there has been no municipal involvement in the wrongdoing." *Id.* at 44.

*Kostka* is in no sense inconsistent with the result urged in this dissent and is remarkably similar in its analysis to the approach advocated here. The *Kostka* court observed the Supreme Court's direction to "carefully assess the existing remedies," *id.* at 42, and to "focus on the precise remedy plaintiffs wish us to create." *Id.* at 44. The First Circuit found that Congress had created in § 1983 a statutory remedy "designed to implement the constitutional guarantee" against those individuals directly responsible for the alleged violations of *Kostka*'s constitutional rights<sup>20</sup> and rested its

decision on the adequacy of that remedy.<sup>21</sup> Congress had provided *no* remedy to redress the constitutional wrongdoing here. The en banc majority, unlike the *Kostka* court, must respond to this fact; it has not done so.<sup>22</sup>

## V.

The en banc court also expresses a fear that "implying this damage action necessarily would draw into the federal judicial system a wide range of cases whose resolution Congress has not committed to the federal judiciary" and "render meaningless the power the Constitution vests in Congress under Article III, Section 1 of the Constitution to es-

20. The court noted that qualified immunity might be available to those individuals, *id.* at 40; defendant here also claims the availability of absolute or qualified immunity. The *Kostka* court properly recognized that immunity is analytically distinct from the implication of a constitutional cause of action and should be addressed with respect to its own underlying policies. In the case at bar, to the extent the immunity issue is relevant to the choice of an appropriate remedial mechanism, the underlying policies weigh in favor of the damages relief sought here. See text, *supra*, at p. —, slip op. at p. 3528.

21. The *Kostka* court's determination that the § 1983 remedy was adequate was explicitly limited to "cases in which there has been no municipal involvement in the wrongdoing." *Id.* at 44. "Were we faced with a case in which the municipality had ordered the constitutional violation, the application of the constitutional test could be different." *Id.* at 45. Here there can be no doubt that if wrongdoing was done, the defendant Passman was responsible for doing it.

22. In *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), the second Court of Appeals case cited by the en banc majority, the Third Circuit faced a claim somewhat similar to that advanced in *Kostka*. The Third Circuit found that "[i]f plaintiffs prove the racially motivated deprivations of their rights which they allege, section 1981 will afford them the redress in federal court which they seek" and affirmed

the district court's dismissal of fourteenth amendment claims on the basis of *Bivens*' teaching "that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy on the plaintiffs' behalf." *Id.* at 1024-25 (citations omitted). Judge Garth, dissenting in part and concurring in part, argued that no fourteenth amendment cause of action could ever be asserted against a city. Judge Garth's reasoning was based in part on logic akin to the *Kostka* courts, and in part on the observation

that the framers of the Fourteenth Amendment intended to confer upon Congress—not the courts—the primary responsibility for developing appropriate measures to enforce the Amendment. Section five of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." None of the first eight Amendments contains a similar provision. Compare *Bivens* . . . (implied cause of action under Fourth Amendment); *Paton v. LaPrade*, 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *United States ex rel Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (Fifth Amendment). *Id.* at 1059. Perhaps needless to say, we find nothing in Judge Garth's observation or in the opinion of the *Mahone* majority inconsistent with the core analysis proposed in this dissent for Ms. Davis' fifth amendment claim.

establish the jurisdictional ambits of the inferior courts it has created." See majority opinion, *supra*, at pp. —, —, slip op. at pp. 3514-3515. Once again, the mechanism of this transformation is more clear to the majority than it is to me; I would have thought the wording and history of 28 U.S.C. § 1331(a), committing to the federal courts jurisdiction of actions "arises under the Constitution, laws, or treaties of the United States" exemplify a rather unambivalent exercise by Congress of its Article III powers.<sup>23</sup>

## VI.

As I would hope the foregoing illustrates, one need not abandon or demean technical legal analysis to uphold a right of action for damages implied directly from the due process clause of the fifth amendment. But I would be less than candid in suggesting that broader philo-

sophical and jurisprudential concerns are not also implicated in the decision of this case. Other courts have spoken of "Bivens' sweeping approbation of constitutionally-based causes of action." *Brault v. Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975); see also *Gardels v. Murphy*, 377 F.Supp. 1389 (N.D.Ill.1974). To some, *Bivens* may be an abhorrent aberrance in our jurisprudence, but to me its benevolent embrace of constitutional rights is a treasure in our judicial trove. I would not desecrate one syllable of that opinion by deviating from its high purpose.

While constitutional interpretation may be subject to ebb and flow, I have never understood the task of the federal judiciary to be the damming—or damning—of rights that spring from that noble document. Courts are not engineers, floodgating constitutional rights. The

23. The en banc majority, while referring at one point to its "affirmance on the jurisdictional ground," majority opinion, *supra*, at p. —, slip op. at p. 3515, explicitly states elsewhere that its affirmance is based on the ground "that the law affords Davis no private right of action." *Id.* at p. —, slip op. at p. 3508. I read the court's decision as in fact finding proper jurisdiction over this case under 28 U.S.C. § 1331(a) and proceeding to a decision on the merits, under Fed.R.Civ.P. 12(b)(6), that the due process clause of the fifth amendment does not support an implied cause of action for damages. Accordingly, jurisdiction will no longer lie in the courts of this circuit to entertain damage actions "arising under" the fifth amendment's due process clause. It is only in this sense that *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976), is overruled. I do not understand the court's action today as denying the analytic soundness of *Weir's* statement that "The jurisdictional issue here is entirely separate from the [question] whether the complaint states a claim on which relief can be granted," *id.* at 873, citing *Bell v. Hood* and *Bivens*. See also *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977):

The question of subject matter jurisdiction is, of course, distinct from that whether plaintiffs have stated a claim upon which relief may be granted. So long as a claim for federal relief is not frivolous, the action arises under federal law for purposes of § 1331 and the federal court has jurisdiction to adjudicate the claim that a federal right of recovery exists. Since no . . . decision forecloses us from inferring a remedy under the Fourteenth Amendment and since *Bivens* gives the plaintiff's claim at least surface plausibility, we have jurisdiction under § 1331.

*Id.* at 41 n. 5 (citations omitted); *Mahone v. Waddle*, 564 F.2d 1018, 1022 (3rd Cir. 1977).

Thus, the court's decision today does not remove jurisdiction from the district courts to entertain *Bivens*—style claims brought under constitutional provisions other than the due process clauses. In each case, so long as the federal claim is not frivolous or barred by a decision of this Circuit or the Supreme Court, jurisdiction will lie for a particularized inquiry, of the sort accorded the due process clause in this case, as to whether a cause of action has been stated.



Supreme Court has spoken, definitively, on the existence of an action for damages flowing directly from the fourth amendment. While judicially self-executing constitutional rights may be exiguous, I find nothing in logic, history, or precedent that directs the building of a floodgate between the fourth amendment and the fifth. On examining the constitutional blueprints I, like the majority, find a right embodied in the fifth amendment; I unlike the majority, would allow that right to be vindicated. If vindication is to be denied, and the *Bivens* landmark washed away in a new constitutional downpour, I would prefer that the cloudburst come not from us, but from the Supreme Court on high. Like Noah, who waited forty days and forty nights, I have faith that the rainbow will finally emerge.<sup>24</sup>

Congress in its wisdom may provide a mechanism for enforcement of a constitutional right, and that mechanism, if effective, is entitled to some measure of judicial deference. But congressional disinclination to provide a means of enforcement does not—cannot—mean that a constitutional right is obliterated. Statutory actions may give breath to constitutional rights, but congressional inaction cannot suffocate them. In the case at hand, Congress has provided no remedy; therefore, the words of the Constitution must be our guiding star. We must not be misdirected by fear of losing our way in some celestial darkness

in the limitless expanse of constitutional space. Not legal science but legal astrology limits *Bivens*' applicability to the fourth amendment, severing the cusp between the fourth and the fifth solely in accordance with the motions of our docket. Were crowded dockets to be our gyroscopes, courts might routinely strip litigants of their constitutional rights out of fear that others might follow their juridical path. I fear that is the slippery slope my brethren embark upon today.

In *Bivens* the Court founded a cause of action for damages directly on the fourth amendment. There is no reason to believe the fifth amendment stands in an inferior position to the fourth. The fifth amendment is constitutionally prime and in constitutional mathematics shares a common denominator with the fourth: the obligation of the federal judiciary "to assure the vindication of constitutional interests." If *Bivens* be a jurisprudential thorn or sport, let the Supreme Court pluck it out. Those of us who sit in a lower judicial caste need not attempt this extirpation.

I have given myself the *Allen* charge. Distasteful as it is to me, I cannot find it possible to yield my conscience to the preponderant majority, respectful as I am of my brothers' intellect, their integrity, their dedication and their loyalty to constitutional privileges. In sorrow I mourn their error.

24. I am reinforced in my faith by the undeniable fact that the two-by-two ascent into the

ark was in conformity with equal protection norms.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 76-1325

KONIAG, INC.  
THE VILLAGE OF UYAK

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1061)

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No. 76-1326

THE VILLAGE OF LITNIK KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT

(Civil 74-1791)

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 76-1327

SALAMATOF VILLAGE ASSOCIATION and  
COOK INLET REGION, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 74-1134)

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No. 76-1328

THE VILLAGE OF ANTON LARSEN BAY KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 74-1792)

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No. 76-1329

THE VILLAGE OF UGANIK KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 74-1790)

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No. 76-1330

THE VILLAGE OF BELLS FLATS KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 74-1793)

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No. 76-1331

THE VILLAGE OF AYAKULIK KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 74-1794)

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No. 76-1332

THE VILLAGE OF PORT WILLIAM KONIAG, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 74-1795)

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No. 76-1333

THE VILLAGE OF SOLOMON BERING SRAITS  
NATIVE CORPORATION

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 75-0452)

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No. 76-1334

VILLAGE OF ALEXANDER CREEK COOK INLET REGION, INC.

v.

CECIL D. ANDRUS, Secretary of the Interior, APPELLANT  
(Civil 75-1097)

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Appeals from the United States District Court  
for the District of Columbia

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Argued March 24, 1977

Decided April 28, 1978

*Jacques B. Gelin*, Attorney, Department of Justice, with whom *Peter R. Taft*, Assistant Attorney General, *Edmund B. Clark*, *Raymond N. Zagone* and *Herbert Pittle*, Attorneys, Department of Justice, were on the brief for appellant.

*Edward Weinberg* and *F. Conger Fawcett* with whom *Frederick L. Miller, Jr.* and *John P. Meade* were on the brief for appellees.

*Avrum M. Gross*, Attorney General, State of Alaska filed a brief on behalf of the State of Alaska as amicus curiae urging reversal.

Before: WRIGHT, *Chief Judge*, BAZELON and ROBB, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge Robb.

Concurring Opinion filed by *Circuit Judge* BAZELON.

ROBB, *Circuit Judge*: The plaintiffs, eleven Native Alaskan villages, filed this action to challenge decisions of the Secretary of Interior which found each of them ineligible to take land and revenues under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.*

The Alaska area director of the Bureau of Indian Affairs (BIA) had determined initially that all eleven villages were eligible under ANCSA but on administrative appeal the Secretary of the Interior ruled to the

contrary. Granting summary judgment to the villages<sup>1</sup> the District Court vacated the Secretary's determinations and ordered the BIA decisions reinstated. *Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975). The District Court did so in four of the cases on the ground that the BIA decisions had been appealed to the Secretary by a party without standing to do so; the appeals were therefore unauthorized and invalid, and under Department of the Interior regulations, the BIA decision, if unappealed, constituted the final decision of the Secretary. In the other seven cases, the court held the procedure followed to determine the appeals failed to comply with due process and further, that congressional interference had infected the determinations. The court ordered the BIA decisions reinstated in these seven cases because the effects of the congressional interference lingered and the BIA decisions were the last untainted decisions of the Secretary's delegate.

On appeal the Secretary attacks each of the District Court's rulings on the merits and argues that the proper remedy under any circumstance is a remand to him rather than reinstatement of the BIA decisions. We conclude that the District Court erred on the standing and congressional interference issues. We agree with the District Court, however, that the appeal procedure used here does not meet the requirements of due process. Accordingly, we hold that the proper remedy is a remand to the Secretary to redetermine these cases.

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<sup>1</sup> The villages are Alexander Creek, Anton Larsen Bay, Ayakulik, Bells Flats, Litnik, Port William, Salamatof, Solomon, Uganik, and Uyak. The Secretary has dismissed his appeal from the judgment as it applies to the eleventh village, Pauloff Harbor.

## THE ACT AND THE REGULATIONS

Claims of Native Alaskans have long created obstacles to development of Alaska's oil and other natural resources and have raised questions of the state's ability to take dominion over public lands that it might otherwise select under provisions of the Alaska Statehood Act. To deal with this problem Congress intended ANCSA to accomplish a fair, rapid settlement of all aboriginal land claims by Natives and Native groups without litigation. The District Court's opinion contains an excellent summary of ANCSA, 405 F. Supp. 1364-67; for our purposes here, however, the complexities of the Act can be simplified. Under ANCSA, 40 million acres of land and \$962,000,000 are to be distributed to Native villages and regional corporations; in exchange, all aboriginal titles and claims are to be extinguished. The funds and lands made available through the Act are to be divided among 13 regional corporations, in which the Natives hold stock, and whatever villages are found to be eligible: Depending upon their population, eligible villages may select between 69,120 and 161,280 acres from the public lands in their vicinity. The village will receive a patent to the surface estate and the regional corporation will receive a patent to the subsurface estate. Village eligibility requirements are set forth in the Act. 43 U.S.C. § 1610(b)(2), (3). The Secretary of the Interior is charged with making village eligibility determinations and with implementing the Act.

The Secretary adopted regulations to govern the decision-making process. 43 C.F.R. Part 2650 (1973). These regulations were applied in deciding the cases of the eleven villages. The Alaska area director of the BIA made initial eligibility determinations on all applicant Native villages. He published his proposed decision in the Federal Register and it became the final decision of the Secretary unless protested by "any interested party"

within thirty days. Upon receipt of a protest, the area director evaluated it and rendered his final decision within thirty days. This decision, in turn was appealed to the Secretary by an "aggrieved party" filing notice with the Alaska Native Claims Appeal Board.<sup>2</sup> 43 C.F.R. § 2651.2 (1973); *id.* § 4.700 (1973). Although the regulations did not require a particular type of hearing on appeals, the Board referred all appeals to a Department of the Interior Administrative Law Judge (ALJ) who conducted a full *de novo* hearing on the record. The parties were permitted to submit proposed findings and conclusions to the ALJ.

At this point the procedure veered from the usual course of administrative law. The recommended decision of the ALJ was forwarded to the Board without being served on the villages concerned. The Board made formal decisions based on the hearing record in each case and forwarded its recommended decisions to the Secretary, also without service on the villages. Only after the Secretary personally decided to accept the Board's decisions were the recommended decisions of the ALJ and the Board revealed to the parties.

### STANDING

The first issue we must resolve is whether appeals from the BIA decisions were properly taken. The BIA area director determined that all ten of the villages before us here, *see* note 1 *supra*, were eligible under ANCSA. The U.S. Fish and Wildlife Service, the Forest Service, and the State of Alaska appealed one or another of the decisions, arguing that the villages did not meet the requirements of the Act. After separate *de novo* proceedings before an ALJ and review as described above, the

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<sup>2</sup> Initially the Board was merely an ad hoc Board. Later the present title was created.



Secretary ruled that the villages were not eligible under the Act.

In the District Court the villages renewed the argument which they had pressed before the ALJ that neither the federal agencies nor the State had standing to appeal from the BIA decisions. The District Court rejected the argument with respect to six of the villages because of the possibility that they might select land from a Wildlife Refuge or National Forest. The court noted:

some presently immeasurable degree of disadvantage may result if an unqualified village obtains authority over a portion of the lands now in the exclusive care of the United States and that this is sufficient to provide standing. . . . Moreover, the Forest Service and the Fish and Wildlife Service have broad mandates to protect our forests and wildlife, *e. g.*, 16 U.S.C. §§ 551, 553; 16 U.S.C. § 742a *et seq.* The Court is particularly reluctant to deny standing to those most likely in fact to have a legitimate concern about these lands and to come forward to protect the public interest, especially where the effect of finding standing is simply to allow adversary proceedings to be held which, if properly conducted, could contribute to fair and informed decision making.

495 F. Supp. at 1368-69.

We agree with the District Court's reasoning here and adopt it.<sup>3</sup> However the District Court went on to hold

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<sup>3</sup> The appellee villages have challenged the District Court's decision that the Forest Service and the Fish and Wildlife Service have standing with respect to the six villages. The Secretary argues that the challenge is barred because the villages have not cross-appealed. Having prevailed below, however, the villages obviously could not have cross-appealed on this issue. Insofar as this attack on the ruling supports their judgment below, however, they may urge the argument here. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *see Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970).

that the appeals from the BIA decisions in four other cases were invalid because as to two, Anton Larsen Bay and Bells Flats, the federal agencies had no standing to take the appeals, and as to two others, Alexander Creek and Solomon, the State of Alaska had no standing.

### *The Federal Agencies*

The District Court ruled against the standing of the agencies to appeal the cases of Anton Larsen Bay and Bells Flats because

[e]ach of these two villages had made extensive good-faith commitments not to take land from a wildlife refuge or national forest. Even the most theoretical harm was removed by these commitments . . .

405 F. Supp. at 1369.

The issue is whether the Secretary has violated his regulations in permitting the Fish and Wildlife Service and the Forest Service to appeal administratively the decision on the eligibility of the two villages. Under the regulations, "any interested party" may protest the BIA initial decision, 43 C.F.R. § 2651.2(a)(3) (1973), and "any party aggrieved" by the BIA final decision may appeal to the Board. 43 C.F.R. § 4.700 (1973). The villages concede that these agencies were "interested parties" for purposes of protest but argue that they were not "parties aggrieved" to appeal. Citing *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 334, 359 F.2d 994, 1000 (1966) and *National Welfare Rights Organization v. Finch*, 139 U.S. App. D.C. 46, 53 n.27, 429 F.2d 725, 732 n.27 (1970) for the proposition that "the concept of standing at the administrative level and in the courts is essentially interchangeable," brief at 15, the villages argue that the agencies are not "parties aggrieved" because they have not demonstrated the kind of concrete injury necessary

for standing to obtain judicial review. Neither case stands for so broad a proposition.

In the *Church of Christ* case the court assumed that the same standards apply to determining standing before an agency and standing to obtain judicial review and went on to hold that the FCC must permit listeners to participate in broadcast relicensing proceedings. In the *National Welfare Rights Organization* case the court reasoned that a party with an interest sufficient to obtain judicial review of agency action should be permitted to participate before the agency to ensure it meaningful judicial review on all the issues. But it does not follow from either case that a party must be *excluded* from participation before the agency if it does not have a sufficient interest to meet Article III requirements for judicial review. Indeed, as we pointed out in the *National Welfare Rights Organization* case, "standing to sue depend[s] on more restrictive criteria than standing to appear before administrative agencies. . ." 139 U.S. App. D.C. at 53 n.27, 429 F.2d at 732 n.27; see *Gardner v. FCC*, 174 U.S. App. D.C. 234, 238, 530 F.2d 1086, 1090 (1976). See also 3 K. Davis, *Administrative Law Treatise* § 22.08, at 240 (1958). To determine what a party must show to qualify as aggrieved under the regulations, we look to the scheme intended and devised by the Congress and the Secretary. See *Office of Communication of the United Church of Christ v. FCC*, *supra* at 334-36, 359 F.2d at 1000-02.

Congress sought to quiet the Native land claims in Alaska justly and expeditiously, so that the State's development could proceed. At the same time Congress took care to assure that grants of public lands would be made only to eligible Native groups by requiring the Secretary to review the eligibility of each village. Over two hundred villages were involved. Although many findings could be perfunctory because eligibility was clear, the

eligibility of some villages was in dispute. It is apparent that the Secretary intended the area director of the BIA to settle the easy, undisputed cases, but when a party was adversely affected by the area director's determination, the Secretary would make his own eligibility determination after more elaborate factfinding in the three-tiered appeal process. A necessary corollary to this scheme is that the term "party aggrieved" must be construed generously to achieve the congressional objective that determinations be careful as well as quick. We conclude, therefore, that grafting strict judicial standing requirements onto these regulations would be inconsistent with the Act and the Secretary's plan to implement it.

Both the ALJ and the Board determined that the Forest Service and the Fish and Wildlife Service were parties aggrieved within the meaning of 43 C.F.R. § 4.700 (1973). Because he approved the Board's decisions the Secretary is presumed to have concurred. This interpretation of the regulation is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The District Court found it determinative that the two villages "had made extensive good-faith commitments not to take land from a wildlife refuge or a national forest". 405 F. Supp. at 1369. However, the ALJ and the Board had held that this did not vitiate the standing of the agencies to appeal. We agree. These villages are located on Kodiak and Afognak Islands, large parts of which are included in Chugach National Forest and Kodiak National Wildlife Refuge. Available public land is thus limited and numerous villages appear to be eligible to select from it. If the two villages make all their selections from the limited unrestricted acreage, other villages may be compelled to choose land within the refuge or forest. The adverse effect on the Forest Service or the Fish and Wildlife Service would be plain. Ample testimony in the records of these two cases, credited by the ALJ, supports



the likelihood of this occurring. Bells Flats ALJ Recommended Decision at 9-10; Anton Larsen Bay ALJ Recommended Decision at 9-10. At best, therefore, the commitments of the two villages not to select forest or refuge land attenuate the likelihood of harm to these agencies, but they do not negate it. We cannot say that the rationale of the ALJ, or of the Board in adopting it, amounts to a "plainly erroneous" interpretation of the term "party aggrieved" as it is used in the regulations. *Udall v. Tallman*, *supra* at 17. Thus we must sustain that interpretation and reverse the District Court's holding that the appeals from the BIA decision on Anton Larsen Bay and Bells Flats were invalid.

### *The State of Alaska*

Alaska was the only party to appeal the decision on the eligibility of Solomon and Alexander Creek.<sup>4</sup> The District Court held that Alaska had no standing to do so because "[t]he State's only interest was the speculative possibility that at some later time for some undisclosed reason it might, under the Alaska Statehood Act, seek to have land patented to it that would be claimed by these villages." 405 F. Supp. at 1369. We think this possibility is enough to confer standing upon Alaska under the regulations.

The Alaska Statehood Act, 72 Stat. 339 (1958), gives Alaska until 1984 to select more than 103 million acres from federal lands in the state not already reserved for another purpose. *Id.* § 6(a), (b), 72 Stat. 340. Putting aside minor exceptions not relevant here, ANCSA reserves 25 townships immediately surrounding a Native

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<sup>4</sup> A political subdivision, the Borough of Matanuska-Susitna also challenged the eligibility of Alexander Creek. Because it appears that the interests of the State and its subdivision are substantially identical, we will deal only with the State's positions here.

village from which the village must select its lands. The regional corporations may fill their land entitlements only with land surrounding a village, and the land patented to the villages and regional corporations cannot be selected by the State. Thus it is in the interest of the regional corporations to establish the existence of eligible villages on valuable mineral-bearing lands, and it is in the interest of the State to prove that such villages are ineligible.

The District Court was persuaded that Congress already accounted for the State's interests in the Act when it

excluded from the definition of "public lands" that could be taken by the villages any "land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969," 43 U.S.C. § 1602(e) (Supp. III, 1973). The failure of the State to bring itself within this statutory provision underscores the conjectural and attenuated nature of its interest here. Alaska had ample opportunity to select land but did not do so, and one does not have standing merely by appearing in a case for the purpose of keeping one's options open an indefinite period in the future.

405 F. Supp. at 1369.

The provision cited by the District Court protects lands in which Alaska already had expressed interest; but we do not infer from it a congressional intention to negate any interest Alaska might have elsewhere. At the time of statehood, and even now, the value of much of the land was not and has not been established. We think Alaska has been reasonable in exercising its right under the Statehood Act to wait until 1984 to complete its land

selections.<sup>5</sup> As in the case of the federal agencies, our inquiry is limited to determining whether the Secretary has violated his regulations in permitting Alaska to take these appeals as a party aggrieved.

The regulations provide that the BIA decisions are to be served on the village affected, all villages within the region, all regional corporations and the State of Alaska. 43 C.F.R. § 2651.2(a) (2), (4), (8). We interpret this requirement as evidence that the Secretary regarded these parties as potentially aggrieved if a village were wrongfully determined to be eligible or ineligible. We agree with the District Court that the interest of Alaska in these two cases is conjectural at best but we emphasize we are not dealing with Article III considerations here; rather, the inquiry is whether the Secretary has violated his own regulations. In light of the broad reading which the Secretary has given the term "party aggrieved" we cannot say that permitting Alaska to appeal in the cases of Solomon and Alexander Creek was a plainly erroneous interpretation of the regulations.

We hold therefore that all ten of the administrative appeals taken in these cases were valid and we turn to the question whether the procedure followed comported with principles of due process.

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<sup>5</sup> In the Statehood Act, Alaska disclaimed all rights to lands held by Natives or by the United States in trust for Natives. 72 Stat. 339 (1958). Through ANCSA Congress has elected to extinguish all aboriginal titles and, in exchange therefor, to patent lands to regional corporations in which all Natives participate and to certain villages in which some Natives live. The disclaimer in the Statehood Act clearly bars Alaska from challenging ANCSA itself. But we think it does not bar Alaska from attempting to show that a given village does not meet the threshold requirements of ANCSA any more than it bars Alaska from challenging the title of an Englishman who merely alleges that he is a Native Alaskan.

## THE ADMINISTRATIVE APPEAL PROCEDURE

The District Court held that the administrative process used here was improper because the

Secretary, who reserved final decision to himself, was prevented from making a rational decision on the records developed because the decisions of both the administrative law judges and the Ad Hoc Board were kept *in camera* and remained undisclosed to the parties until the Secretary had already reached his final decision. This process denied the villages the opportunity to bring to the Secretary's attention any exceptions or objections they might have had to the determinations below.<sup>5</sup>

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<sup>5</sup> Indeed, it appears that the Secretary did not even see the proposed findings of fact submitted by the villages to the administrative law judges.

405 F. Supp. at 1370 [footnote omitted].

The Secretary argues that the administrative decision-making was institutional. Relying upon the *Morgan* cases<sup>6</sup> the Secretary asserts that he was not required to circulate to the parties "recommended decisions prepared by subordinates for approval by the Secretary." Under this analysis the ALJ and the Board are mere assistants who aided the Secretary in making his decision by tendering recommendations in the nature of draft decisions. The institutional process used here, in the Secretary's view, met whatever due process requirements there were by affording all parties an opportunity to present their cases and confront their opponents before the ALJ.<sup>7</sup> We do not agree.

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<sup>6</sup> *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Morgan*, 313 U.S. 409 (1941).

<sup>7</sup> Evidently the submissions of the villages which were received were not even forwarded to the Secretary with the record. See 405 F. Supp. at 1370 n.5.



At the outset we affirm the District Court's holdings that the villages have a sufficient property interest to come within the due process clause. 405 F. Supp. at 1370. Indeed the Secretary concedes as much. The issue is what process is due under the circumstances. The Secretary argues that the opportunity to present a case and to confront opponents before the ALJ was enough. The difficulty with this position is that it overlooks the mandate of Congress in ANCSA which declares that "the settlement should be accomplished . . . with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). We are unable to reconcile the Secretary's "institutional" approach with so clear an expression of Congress' will.

The only conceivable purpose of the secret review procedure was to expedite the resolution of the claims. This is a valid purpose, responsive to Congress' instruction that the settlement be accomplished rapidly; nevertheless, affording the villages an opportunity to see the recommended decisions and to brief exceptions to them would cause only a slight delay in the proceedings. At the same time that opportunity would greatly enhance the participation of the Natives as well as the appearance of fairness so critical to the administrative process.

Determinations of village eligibility need not comply with the Administrative Procedure Act (APA) requirements for adjudications because ANCSA does not require that they be made "on the record after an opportunity for an agency hearing." 5 U.S.C. § 554(a); *see* 43 U.S.C. § 1610(b)(2), (3). Nonetheless, we are guided by its requirements in a case such as this which entails due process rights but has no controlling statutory procedures. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 50-51 (1950); *Riss & Co. v. United States*, 341 U.S. 907 (1951), *rev'g per curiam*, 96 F. Supp. 452 (W.D. Mo. 1950) (3 judge court). Section 557(c) of the APA provides that

parties be given an opportunity to submit proposed findings and conclusions, or exceptions to decisions before a recommended, initial, or tentative decision of an agency is reviewed within the agency. In these cases there were two intermediate decisions in the administrative review process, the ALJ's initial decisions and the Board's recommended decisions. The villages had an opportunity to submit, and did submit, proposed findings and conclusions to the ALJs before the initial decisions were made. The villages were not, however, permitted to see the ALJs' decisions nor were they permitted to submit exceptions before the Board made its recommended decisions. We believe that ANCSA's requirement of maximum participation by the Natives required the Secretary to extend the full measure of procedural rights suggested by section 557(c). Considering the great importance to the Natives of these potential property rights (the *quid pro quo* for the extinguishment of their aboriginal titles), the congressional requirement of maximum participation by the Natives, and the minimal cost to administrative expediency, see *Mathews v. Eldredge*, 424 U.S. 319, 335 (1976), we hold that on remand the Secretary must permit the parties to take exceptions to the ALJs' decisions<sup>8</sup> and to submit briefs thereon to the Board.

The Supreme Court's recent decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, — U.S. —, 46 U.S.L.W. 4301 (Apr. 3, 1978) does not require a different result. In that case, the Court held that a reviewing court may not dictate to an agency the methods and procedures to be followed to develop an adequate record for judicial review.

Absent constitutional constraints or extremely compelling circumstances "the administrative agencies

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<sup>8</sup> The ALJ recommended decisions themselves are not attacked here and are accordingly not disturbed.

'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Federal Communications Comm'n v. Schreiber*, 381 U.S. 279, 290 (1965), quoting from *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

46 U.S.L.W. at 4307. Our holding today does not trench upon this principle. We hold only that the Secretary's secret review process is inconsistent with both constitutional constraints and the mandate of ANCSA that Natives participate as fully as possible in the decisionmaking.

#### THE REMEDY

The District Court ordered the decisions of the BIA area director reinstated because hearings conducted by Congressman Dingell "constituted an impermissible congressional interference with the administrative process", 405 F. Supp. at 1372, which destroyed the appearance of administrative impartiality and caused actual prejudice to the villages, denying them fundamental fairness required by the Fifth Amendment. See *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). The court believed that the effects of the interference lingered making the usual remedy, remand to the Secretary for a redetermination, impossible. We disagree.

The hearings in question were called by Congressman Dingell in June of 1974 at the time the Board and the Secretary were considering most of these cases. *Alaska Native Claims, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. (1975). During the hearings Congressman Dingell made no secret of his displeasure with some of the initial BIA eligibility determinations. Nevertheless, we think the *Pillsbury* decision is not controlling here be-

cause none of the persons called before the subcommittee was a decisionmaker in these cases. One possible exception was Mr. Ken Brown, a close advisor to the Secretary who briefed him on the cases at the time he decided to approve the Board's recommended decisions. However, even if we assume that the *Pillsbury* doctrine would reach advisors to the decisionmaker, Mr. Brown was not asked to prejudge any of the claims by characterizing their validity. See *Pillsbury Co. v. FTC*, *supra* at 964. The worst cast that can be put upon the hearings is that Brown was present when the subcommittee expressed its belief that certain villages had made fraudulent claims and that the BIA decisions were in error. This is not enough.

A more serious matter is a letter that Congressman Dingell sent to the Secretary two days before he determined that eight of these villages were ineligible. The letter requested the Secretary to postpone his decisions on the cases pending a review and opinion by the Comptroller General, because it "appears from the testimony [at the hearings] that village eligibility and Native enrollment requirements of ANCSA have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANCSA." The letter did not specify any particular villages, but we think it compromised the appearance of the Secretary's impartiality.<sup>9</sup> *D.C. Federation of Civic Ass'ns v. Volpe*, 148 U.S. App. D.C. 207, 222, 459 F.2d 1231, 1246, *cert. denied*, 405 U.S. 1030 (1972); see *Pillsbury Co. v. FTC*, *supra* at 964. Nevertheless, a remand to the Secretary, rather than a reinstatement of the BIA decisions, is the proper remedy in this case. Assuming the worst—that the letter contributed to the Secretary's decision in these cases—we cannot say that 3½ years

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<sup>9</sup> We of course intimate no view as to the validity of the Congressman's criticism.



later, a new Secretary in a new administration is thereby rendered incapable of giving these cases a fair and dispassionate treatment.

#### RESIDENCE DETERMINATION

One final matter remains to be considered. The villages challenge the District Court's conclusion that because the residence of Natives is not established conclusively by the roll prepared by the Secretary pursuant to 43 U.S.C. § 1604 residence was open to redetermination in the village eligibility proceedings. The Secretary argues that this challenge is barred because no cross-appeal was filed. We reject this argument, *see* note 3 *supra*, but affirm the District Court's interpretation of the statute for the reasons stated in its opinion.<sup>10</sup> 405 F. Supp. 1373-74.

#### CONCLUSION

We hold the administrative appeals by the Fish and Wildlife Service, the Forest Service, and the State of Alaska were valid. The appeal process itself, however, should have permitted the parties to take exceptions to the ALJs' recommended decisions and to submit briefs to the Board for its consideration. Therefore, these cases must be remanded to the District Court for remand to the Secretary for redetermination of the appeals. The judgment of the District Court is

*Affirmed in part, reversed in part.*

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<sup>10</sup> The District Court also ruled that the Secretary had not violated his trust responsibilities to the Alaska Natives and that the statutory criteria in the Act for "listed" villages are exclusive. 405 F. Supp. at 1373-74. No appeal has been taken on either issue and we leave the District Court ruling undisturbed.

BAZELON, *Circuit Judge, concurring*: I join Judge Robb's fine opinion for the court, but wish to highlight my reasons for concluding that appellants had standing to seek administrative review of the village eligibility decisions.

The decisions of this court and others on administrative standing have created not a little uncertainty.<sup>1</sup> It is unclear whether the limitations appertinent to judicial standing apply in the administrative context. And if such limitations do not apply, it is unclear what standards should govern. For the reasons set forth below, I find no basis for importing judicial standing doctrines into the administrative area. In my view, administrative standing should be determined in light of the functions of an administrative agency, and whether a would-be participant would contribute to fulfilling those functions.

## I.

An examination of the theoretical foundations of judicial standing reveals no reason to equate judicial and administrative standing. The Supreme Court has identified two general types of judicial standing limitations—constitutional limitations derived from the “case or controversy” requirement of Article III, and prudential limitations formulated by the Court in its supervisory capacity over the federal judiciary. *See generally, Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-46 (1976); *Warth v. Seldin*, 422 U.S. 490, 498-502 (1975). Neither type of limitation is applicable in the administrative context.

The “case or controversy” requirement of Article III restricts federal courts to adjudication of disputes in which a plaintiff has a “personal stake” in the outcome.

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<sup>1</sup> See text and notes at nn.5-7 *infra*.

*Baker v. Carr*, 369 U.S. 186, 204 (1962). This means, first and most fundamentally, that a plaintiff must allege "some threatened or actual injury resulting from the putatively illegal action. . . ." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). In addition, the Supreme Court has ruled that a plaintiff must assert an injury that is likely to be "redressed by a favorable decision," *Eastern Kentucky*, *supra* at 38, and an injury that can fairly "be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.*

Administrative agencies, like federal courts, frequently exercise adjudicatory or "quasi-judicial" functions. But administrative tribunals have few if any of the indicia of the "inferior courts" Congress is authorized to establish pursuant to Article III.<sup>2</sup> Even independent regulatory agencies do not share the two attributes of federal courts explicitly mentioned by the Constitution—secure compensation and life tenure. Hence, administrative agencies are not bound by the "case or controversy" limitation of Article III.<sup>3</sup> Congress, in its discretion, can require that any person be admitted to administrative

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<sup>2</sup> See *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962) (opinion of Harlan, J., joined by Brennan and Stewart, JJ.) ("[W]hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite."); *Gardner v. FCC*, 530 F.2d 1086, 1090 n.18 (D.C. Cir. 1976) ("[A]djudicative agencies are really a type of 'legislative court, which operates free from the restrictions of Article III.'").

<sup>3</sup> *Cf. Palmore v. United States*, 411 U.S. 389 (1973) (Article I tribunal need not comply with the tenure and salary provisions of Article III.)

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proceedings, whether or not that person has alleged "injury in fact" or has satisfied the other constitutional standing requirements recognized by the Supreme Court.

Prudential rules of judicial standing, like Article III limitations, are "founded in concern about the proper—and properly limited—role of courts in a democratic society." *Warth, supra* at 498. The major prudential limitations recognized by the Supreme Court are the requirement that the plaintiff assert an interest "'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," *Eastern Kentucky, supra* at 39 n.19; that the plaintiff assert more than "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Warth, supra* at 499; and that the plaintiff assert his own rights and interests, rather than those of third parties. *Id.*

The function of prudential standing rules, the Court has stressed, is to "limit the role of courts in resolving public disputes." *Warth, supra* at 498; *id.* at 500. Prudential limitations serve to define "the proper judicial role relative to the other major governmental institutions in the society." *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 139 (D.C.Cir 1977). In short, prudential limitations reflect a concern about the limited authority and competence of the judiciary in setting general policy.

As such, prudential limitations are no more applicable to administrative agencies than Article III limitations. The authority of federal courts to set general policy is restricted by Article III, which empowers courts to hear only "cases" and "controversies." Administrative agencies, on the other hand, derive their powers from Congress, and thus indirectly from Article I. Although this



delegation of power is subject to limitations,<sup>4</sup> an agency has unquestioned authority to set general policies affecting large numbers of people when it acts within the scope of its statutory mandate.

The competence of federal courts to formulate general policy is also severely limited by the method in which they reach decisions. Courts are confined to the resolution of particular disputes in an adversary setting. Administrative agencies, however, have unique resources for establishing broad, prospective policies. Unlike courts, administrative agencies can devote uninterrupted attention to relatively narrow problem areas, and can call upon technical staff assistance in formulating solutions. Unlike courts, they are not limited to the adjudicatory format, but have the flexibility to proceed by adjudication, legislative hearings, rulemaking, investigation or in other ways. And unlike courts, agencies do not have to wait for a plaintiff to file suit; they have the power to institute an investigation or an action on their own initiative.

The decisions of this circuit, as appellants acknowledge, are "not uniform" on the subject of whether judicial standing principles should be applied in administrative proceedings. App. Br. at 14 n.4. Admittedly, a number of decisions, including one by the author of this opinion, have applied judicial standing concepts in determining whether a party should have standing before an agency.<sup>5</sup>

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<sup>4</sup> *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

<sup>5</sup> *Martin-Trigona v. Federal Reserve Bd.*, 509 F.2d 363, 366 (D.C. Cir. 1975) (Bazelon, C.J.); *see also* *American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1347 (9th Cir. 1975); *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732-33 (D.C. Cir. 1970); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966) and cases cited. For cases recognizing a distinction between judi-

At the same time, however, nearly all courts that have considered the question have recognized at least a theoretical distinction between judicial and administrative standing.<sup>6</sup> Moreover, most decisions that apply judicial standing concepts stand only for the proposition that if a party would have standing to seek judicial review of administrative action, he should be allowed to appear before the agency, if only to assure the proper development of the record. *See, e.g., National Welfare Rights Organization v. Finch*, 429 F.2d 725, 736-37 (D.C.Cir.

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cial and administrative standing *see, e.g.,* Pittsburgh & W.Vir. Ry. Co. v. United States, 281 U.S. 378 (1930); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249 (1930); Gardner v. FCC, 530 F.2d 1086, 1090 (D.C.Cir. 1976); Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973); United States v. Board of Sch. Com'rs. of Indianapolis, Ind., 466 F.2d 573, 577 (7th Cir. 1972); National Motor Freight Traffic Ass'n v. United States, 205 F.Supp. 529, 593-94 (D.D.C.), *aff'd*, 371 U.S. 223 (1962), *reh. denied and opinion clarified*, 372 U.S. 246 (1963). Commentators have generally recognized that there are practical and theoretical differences between administrative and judicial standing. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 239-43 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 524 (1965); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 726, 767 (1968).

<sup>6</sup> As we stated in Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976):

Within their legislative mandates, agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court. The agencies' responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the constitution or the common law.

*See also* Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363, 366 n. 10 (D.C. Cir. 1975); National Welfare Rights Org. v. Finch, 429 F.2d 725, 732 (D.C. Cir. 1970).

1970).<sup>7</sup> As such, these cases do not establish that administrative standing would necessarily be improper if a party would *not* have standing to obtain judicial review.

The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process.

## II.

What *should* be the standards for determining standing to appear before an agency? Generalizations are hazardous, for administrative standing questions arise in contexts as diverse as the methods and objectives of the agencies themselves. Nevertheless, the present case suggests some principles that may be broadly applicable.

The starting point in determining administrative standing should be the language of the statutes and

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<sup>7</sup> See also *American Communications Association v. United States*, 298 F.2d 648, 650-51 (2d Cir. 1962). *Martin-Trigona v. Federal Reserve Bd.*, 509 F.2d 363 (D.C.Cir. 1975) is exceptional, in that we there sustained a denial of a petitioner's request for a hearing, relying in part on judicial standing concepts. The decision was a limited one, however, and we made it clear that "the different policies applicable to standing before this court and before an administrative agency might in a different context require different concepts of standing." *Id.* at 366 n.10. The denial of administrative standing would have been proper in any event under a functional analysis, see Part II *infra*, since the petitioner refused to state the nature of his interest. *Id.* at 367.

regulations that provide for an administrative hearing, appeal or intervention. To be sure, these sources frequently provide no criteria for determining standing, or speak in vague terms of persons "aggrieved," "affected," or having an "interest"—in which case they are of little assistance. On occasion, however, the applicable statutes and regulations do supply specific criteria for determining standing, in which case they should of course be controlling.

An example of a regulation supplying relatively precise standards is 43 C.F.R. § 4.902 (1976), part of the new regulations on ANCSA hearing procedures promulgated after the hearings in the instant cases were completed.<sup>8</sup> This section provides:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

This regulation quite clearly establishes three classes of persons who have standing: those asserting a property interest in land, federal agencies, and regional corporations in land selection cases. It thus provides fairly objective criteria that can be applied without recourse to a more refined analysis.<sup>9</sup>

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<sup>8</sup> See 40 Fed. Reg. 33172 *et seq.* (1975), *codified as* 43 C.F.R. § 4.900 *et seq.* (1976).

<sup>9</sup> Generally, an appeals court must apply the law—including regulations—in effect at the time it renders its decision, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd. of the City of Richmond*, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-82 (1969). Since the court concludes



More often, however, the statutes and regulations do not provide specific guidelines for determining administrative standing. The regulation actually applied in these cases, for example, refers only to "[a]ny party aggrieved. . . ." 43 C.F.R. § 4.700 (1976).<sup>10</sup> Such a general and indefinite provision suggests no concrete standards for determining who should have standing to appeal. In these circumstances, I believe a functional analysis of administrative standing is appropriate. Such an analysis would examine the nature of the asserted interest, the relationship of this interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions.

There is nothing revolutionary about such an approach to administrative standing. Several commentators have suggested adoption of a functional standard.<sup>11</sup> Moreover,

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that the federal agencies and the State of Alaska had administrative standing under 43 C.F.R. § 4.700, maj. op. at 10, 13, it is unnecessary to consider whether 43 C.F.R. § 4.902 should be applied retrospectively to this case. *See* Nixon v. Sampson, Nos. 75-2194 & 2195 (D.C.Cir., March 22, 1978).

<sup>10</sup> § 4.700 Who may appeal.

Any party aggrieved by an adjudicatory action or decision of a Department official relating to rights or privileges based upon law in any case or proceeding in which Departmental regulations allow a right of appeal to the head of the Department from such action or decision, should direct his appeal to the Director, Office of Hearings and Appeals, if the case is not one which lies within the appellate review jurisdiction of an established Appeals Board and is not excepted from the review authority delegated to the Director. No appeal will lie when the action of the Departmental official was based solely upon administrative or discretionary authority of such official.

43 C.F.R. § 4.700 (1976).

<sup>11</sup> *See* Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administra-*

the elements of a functional approach can be discerned in our prior decisions—most prominently, in fact, in the very cases cited by appellees for the proposition that judicial standing limitations should govern.

The seminal decision on administrative standing pointing toward a functional approach is *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir. 1966). We held there that standing to intervene in a Federal Communications Commission license renewal proceeding is not limited to those alleging economic injury or electrical interference, but extends also to responsible representatives of the listening public. We ruled that “the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding.” *Id.* at 1002. Given this standard, we could “see no reason to exclude those with such an obvious and acute concern as the listening audience.” *Id.* Moreover, we found that the Commission had insufficient resources to fulfill its obligation to assure balanced broadcast programming. Representatives of the listening public, acting as “private attorneys general” enforcing the Commission’s Fairness Doctrine, would therefore provide valuable assistance. *Id.* at 1003-04. We specifically rejected the Commission’s argument that a broad rule of standing would overwhelm the Commission with “hosts” of protestors, and found that the Commission had authority to adopt rules to screen out spurious petitions and “limit public intervention to spokesmen who can be helpful.” *Id.* at 1005.

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*tive Proceedings*, 81 YALE L. J. 359 (1972); Jacks, *The Public and Peaceful Atom: Participation in AEC Regulatory Proceedings*, 52 TEX L. REV. 466 (1974); Shapiro, *supra* note 5; cf. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

In *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C.Cir. 1970), we expanded the rationale of *United Church of Christ*, making the functional elements of the analysis even more explicit. We held that organizations of welfare recipients were entitled to take part in hearings conducted by the Department of Health, Education and Welfare to determine if state welfare programs were in conformance with federal standards. A functional-type analysis of the organizations' standing served as an alternative ground for the decision:

As intervenors in conformity hearings appellants may serve the public interest in the maintenance of an efficient state-federal cooperative welfare system. Appellants' role would be analogous to that of persons accorded standing, not for the protection of their own private interests, but because they are especially well suited to represent an element of the public interest. Thus they serve as "private attorneys general."

*Id.* at 738. As in *United Church of Christ*, *supra*, we noted that the "threat of hundreds of intervenors" was more apparent than real. The appropriate way to limit the possibility of abuse was "by controlling the proceeding so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence," not by "excluding parties who have a right to participate." *Id.*, quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364 n.1 (D.C.Cir. 1959).<sup>12</sup>

These authorities suggest a functional analysis composed of the following factors:

- (1) The nature of the interest asserted by the potential participant.

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<sup>12</sup> See also *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F.2d 577, 590-92 (D.C.Cir. 1969).

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- (2) The relevance of this interest to the goals and purposes of the agency.
- (3) The qualifications of the potential participant to represent this interest.
- (4) Whether other persons could be expected to represent adequately this interest.
- (5) Whether special considerations indicate that an award of standing would not be in the public interest.

Such a standard would have to be flexible, of course, and the appropriate variables might well vary from one context to another.<sup>13</sup> The important point is that administrative standing should be tailored to the functions of the agency, not to arcane doctrine from another area of the law.

Under such an approach, there can be little doubt that the Secretary acted properly in finding that the United States Fish and Wildlife Service, the National Forest Service, and the State of Alaska had standing to appeal the eligibility determinations of the BIA area director. In fact, although the standing discussion of the Alaska Native Claims Appeals Board, acting for the Secretary,

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<sup>13</sup> One important distinction might be between a would-be participant seeking to institute a new administrative hearing or appeal, and one merely seeking to intervene in an on-going proceeding. An award of standing in the former circumstances is clearly more burdensome than in the latter. *See* 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 241 (1958). Since intervention generally has no effect on what decisions are reached, or when they are rendered, it might be appropriate in considering requests for intervention merely to focus on (1) whether the potential intervenor represents a point of view that would assist in illuminating the issues; (2) whether he is qualified to represent this point of view; (3) whether other parties to the proceeding could be expected to represent this perspective; and (4) whether there are special considerations that indicate intervention would not be in the public interest.



relied in part on a consideration of judicial standing concepts, it also included an elementary functional analysis.

The federal agencies and the State of Alaska maintained that if certain villages were eligible to take public lands, their own flexibility in selecting such lands would be impaired. The Board found that this interest established "a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility." *State of Alaska v. Village of Solomon*, Final Decision of Board and Secretary (Sept. 16, 1974) at 4. Thus, the Board found that the asserted interest was relevant to one of the principal purposes of the Act—determination of eligibility "with the fullest possible command of the relevant facts." *Id.* the board concluded that it was proper to recognize appellants' standing, "particularly when the Secretary's factfinding obligation would be thwarted by a more restrictive approach." *Id.* No suggestion was made by the Board that appellants were not qualified to represent the interest they asserted, that affording them an appeal would result in duplicative presentations, or that there were any considerations of public policy militating against recognizing their standing.<sup>14</sup>

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<sup>14</sup> The Board's functional-type analysis is also found, virtually verbatim, in *U.S. Fish & Wildlife Service v. Village of Bells Flats*, Final Decision of Board and Secretary (Sept. 20, 1974) at 2-3; and *U.S. Forest Service v. Anton Larsen, Inc.*, Final Decision of Board and Secretary (Oct. 3, 1974) at 2-3. It is alluded to in *State of Alaska v. Alexander Creek, Inc.*, Final Decision of Board and Secretary (Oct. 23, 1974) at 8. The full statement of the analysis in *Village of Solomon* is as follows:

It is recognized, as argued by the Respondents, that courts have applied [judicial] tests to determine the standing of litigants before them. However, it must also

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Under these circumstances, the Board was amply justified in finding that appellants had standing. Further analysis of standing concepts, judicial or otherwise, was unwarranted and unnecessary.

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be remembered that the Board is an administrative body, not a court.

The Board acts in this proceeding for the Secretary, who has been directed by Congress in Section 11(b)(3) of the Act to determine village eligibility through consideration of census data or other evidence, and to "make findings of fact in each instance."

\* \* \* \*

In carrying out this duty, delegated to it by the Secretary, the Board is authorized, in its discretion, to direct hearings. (43 CFR 2651.2(a)(5); 43 CFR 4.704).

It is clearly the purpose of such hearings to enable the Secretary, through the Board, to fulfill his statutory obligation of deciding village eligibility appeals with the fullest possible command of the relevant facts.

This purpose is best served by recognizing standing of a party who demonstrates a nexus with the village sufficient to assure the presentation of factual evidence relevant to the village's eligibility.

The Board will therefore be guided by a relatively broad concept of standing, particularly when the Secretary's fact-finding obligation would be thwarted by a more restrictive approach.



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## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-2194

RICHARD M. NIXON, INDIVIDUALLY AND AS THE FORMER  
PRESIDENT OF THE UNITED STATES, ET AL.

v.

ARTHUR F. SAMPSON, INDIVIDUALLY AND AS  
ADMINISTRATOR OF GENERAL SERVICES, ET AL.

REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, ET AL., APPELLANTS

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No. 75-2195

THE REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, ET AL., APPELLANTS

v.

ARTHUR F. SAMPSON, INDIVIDUALLY AND AS  
ADMINISTRATOR OF GENERAL SERVICES

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.



No. 75-2196

LILLIAN HELLMAN, ET AL.

v.

ARTHUR F. SAMPSON, INDIVIDUALLY AND AS  
ADMINISTRATOR OF GENERAL SERVICES, ET AL.REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, ET AL., APPELLANTS

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Appeals from the United States District Court  
for the District of Columbia

(D.C. Civil 74-1518, 74-1533, 74-1551)

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Argued May 10, 1977

Decided March 22, 1978

*Mark J. Spooner*, with whom *Robert E. Herzstein*, *Andrew S. Krulwich*, *Simon Lazarus, III* and *Leonard Simon* were on the brief, for appellants.

*Charles S. Rhyne*, with whom *William S. Rhyne* and *Richard J. Bacigalupo* were on the brief, for appellee, Woods.

*Rex E. Lee*, Assistant Attorney General, *Irwin Goldbloom*, Deputy Assistant Attorney General and *David J. Anderson*, Attorney, Department of Justice, were on the brief, for appellees, The Administrator of General Services and the Counsel to the President.

Before: BAZELON, *Chief Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: Section 101(b)(1) of the Presidential Recordings and Materials Preservation Act (the Act), Pub. L. 93-526 (1974), 88 Stat. 1695, 44 U.S.C. § 2107 (Supp. V 1975), directs the Administrator of General Services (the Administrator) to take custody of all "papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon." Appellee, Rose Mary Woods, sought to remove from the Administrator's custody approximately fifty cartons of material that she claimed was her personal property. Appellants, Reporters Committee for Freedom of the Press, et al., (Reporters Committee), sought to prevent the removal of this material until regulations implementing the Act had been promulgated by the Administrator and accepted by Congress.<sup>1</sup> On December 16, 1977, while this

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<sup>1</sup> Section 104 of the Act provides that:

(a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of government power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

case was under consideration, these regulations became effective. 42 Fed. Reg. 63626 (1977).<sup>2</sup>

## I

The background of this litigation is extraordinarily complex. Soon after leaving office, Mr. Nixon entered into an agreement with the Administrator of General Services, Arthur F. Sampson, concerning the disposition of the former's "Presidential historical materials."<sup>3</sup> Mr. Nixon later brought suit in district court to enforce the implementation of this agreement. Mr. Sampson was a

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(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b) (1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

<sup>2</sup> This court was not informed of the effective promulgation of the regulations until February 24, 1978. The two-month delay unfortunately placed an additional burden on our deliberations and represented a level of responsibility less than we have a right to expect. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1976).

<sup>3</sup> The agreement is reproduced in *Nixon v. Sampson*, 389 F.Supp. 107, 160-62 (D.D.C. 1975) (Appendix A).

named defendant. Shortly thereafter two groups of plaintiffs, of which Reporters Committee was one, brought suit seeking to have these materials declared the property of the United States government, to enjoin their transfer to Mr. Nixon, and to gain access to them under the Freedom of Information Act. In one action Mr. Nixon was a named defendant, in another he was permitted to intervene. These two actions were ultimately consolidated with the suit brought by Mr. Nixon; the Watergate Special Prosecutor and Jack Anderson, a newspaper columnist, were both permitted to intervene in Mr. Nixon's suit, the former as a defendant and the latter as a plaintiff. See *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 331-32 (D.D.C. 1976); *Nixon v. Sampson*, 389 F.Supp. 107 (D.D.C. 1975). These actions came collectively to be known as the "consolidated cases."

On December 20, 1974, the day after the Act was signed into law, Mr. Nixon brought suit challenging its constitutionality. We stayed all action in the consolidated cases until the Act's constitutionality could be determined. *Nixon v. Richey*, 513 F.2d 430 (D.C. Cir. 1975). However, on August 7, 1975, appellee Rose Mary Woods sought leave to intervene in the consolidated cases in order to recover what she claimed were her personal papers. On September 2, we granted leave to intervene and modified our stay "to enable the District Court, in its discretion, to enter an order . . . to authorize the return of the materials sought, nothing herein contained being intended to intimate any view as to the disposition by the District Court of any applications which may be made to it." Joint Appendix (J.A.) at 35.

Ms. Woods subsequently intervened in the consolidated cases. She claimed that Ms. Mary M. Filippini, Administrative Assistant for the Office of Presidential Materials at the General Services Administration and prior to that a staff member of the Office of Presidential Libraries at



the National Archives and Records Service, had examined certain materials and prepared a "List F" containing items that were "solely the personal materials and papers" of Ms. Woods.<sup>4</sup> Ms. Woods sought to recover the approximately fifty cartons of material enumerated in List F. She appended an affidavit of Ms. Filippini in which the archivist stated that she had personally inspected and compiled List F, and that:

Basing my judgment on the same criteria used in collecting Nixon Presidential Materials from other White House staff members and staff offices prior to and since August 9, 1974, I find none of the items described on "List F" . . . to be "Presidential historical materials of Richard M. Nixon."

J.A. at 89. Ms. Filippini appended to her affidavit an "Exhibit I" containing the "criteria" she had used in compiling List F. This Exhibit I was a White House memorandum of August 9, 1974, stating that:

Personal files include correspondence unrelated to any official duties performed by the staff member; personal books, pamphlets and periodicals; daily appointment books or log books; folders of newspapers or magazine clippings; and copies of records of a personnel nature relating to a person's employment or service.

J.A. at 91. "Personal files" were those not considered to be historical materials.

Defendant Sampson answered Woods' complaint and stated that he did not oppose her requested relief. No opposition was voiced by the Special Prosecutor or by any other defendant. Reporters Committee, however, a plaintiff in the case below, filed a "Protective Answer" opposing Woods' complaint and denying that the materials sought were her personal property. J.A. at 116-18.

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<sup>4</sup> Complaint ¶ 11; J.A. at 38.

On November 19, Ms. Woods filed a motion for judgment on the pleadings stating that the contents of the Filippini affidavit were admitted by defendant Sampson "and remain uncontroverted." J.A. at 125-26. Despite the opposition of Reporters Committee, the district court granted Ms. Woods' motion on December 2, 1975. It noted specifically that "Defendants do not oppose the relief sought by Plaintiff-Intervenor." J.A. at 149.

Reporters Committee appealed. Defendant Sampson has filed a brief in this court arguing that the district court's decision should be upheld.<sup>5</sup>

On March 25, 1976, before oral argument was held on appeal, this court ordered the parties to begin negotiations so as "to stipulate those materials as to which no controversy exists." We took this step because it appeared "that at least a substantial number of the materials enumerated in List F are so plainly the personal and private property of appellee Woods and so lacking in historical or commemorative value or significance as

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<sup>5</sup> In his brief, Sampson argues that "any undue delay after Miss Woods' demand was made might well subject the United States to a claim for just compensation if its retention of those materials resulted in depriving her of personal property. By disputing the government and Miss Woods and delaying the ultimate resolution of this matter, appellants have substantially increased the exposure of the United States to such a recovery. In order to protect against this eventuality, the government intends to make a request for security from the appellants in the district court if this court takes any action other than an outright affirmance." Br. at 7-8.

Compensation for the deprivation of personal property is authorized by § 105(c) of the Act:

If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

to preclude any colorable claim that they fall within the reach of Section 101 of the Presidential Recordings and Materials Preservation Act. . . .”

By the time of oral argument well over half of the materials on List F had been released to Ms. Woods because the parties had stipulated that they were so plainly lacking in historical significance as to preclude any colorable claim that they fell within the reach of Section 101 of the Act.<sup>6</sup>

## II

Section 104(a) of the Materials Preservation Act, *supra* note 1, directs the Administrator to “submit to each House of the Congress a report proposing and explaining regulations that would provide public access” to the Presidential historical materials controlled by the Act. These regulations, however, were not in effect when Rose Mary Woods intervened in the consolidated cases to obtain the return of what she claimed were her personal papers. The ruling of the district court was thus that the affidavit of Ms. Filippini was sufficient, in the absence of such regulations, to establish that the materials sought by Ms. Woods were not within the purview of the Act. The regulations subsequently promulgated, however, set forth standards defining more fully the nature of the materials controlled by the Act and created an elaborate proce-

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<sup>6</sup> At oral argument counsel for appellants described these materials as consisting chiefly of “stenographic pads, ball-point pens, books, and the like.” As for these materials, no present controversy exists, and they are no longer part of this case.

The materials that remain in controversy include files labelled: “Tapes—Gap Problems of Others”; “Butterfield, Alex (re: tapes)”; “Buzhardt Testimony (questions)”; “Logs”; “Rebozo, C.G.”; “Tapes—Access (TSD handling of)”; “Mitchell”; “Safe Access Long—Oct. 4-7, 1973, Key Biscayne”; “Stans, Maurice”; “Panel (Tape Gap).”

dural system for the evaluation and transfer of materials according to these standards. 42 Fed. Reg. 63626 (1977). We need not reach the question whether the establishment of this procedural system, by itself, constitutes sufficient grounds now to dismiss Ms. Woods' suit, *see Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 720 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 459 n.22 (1977), since we hold that the criteria used by Ms. Filippini in compiling List F were not in accordance with the standards required by the Act.

We view the essential question in this case to be the meaning of the "Presidential historical materials" over which Section 101(b)(1) of the Act directs the Administrator of General Services to acquire custody.<sup>7</sup> Section 101(b)(2) states that, "[f]or purposes of this subsection, the term 'historical materials' has the meaning given it by section 2101 of Title 44, United States Code." Appellee argues that § 101(b)(2) thus "adopts the standard of the archival art current at the time of the Act (December 19, 1974) without reference to regulations." Brief for appellee at 21. Since appellee claims that Ms. Filippini used this standard in compiling List F, she urges that the district court's judgment be affirmed.

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<sup>7</sup> This is a question of statutory construction. We are not persuaded by appellee's argument that our decision is controlled by "the doctrine of Law of the Case." Brief for appellee at 22. Our September 2 order specifically declined to express or "intimate any view as to the disposition by the District Court of any applications which may be made to it." Nor are we persuaded by appellee's argument that judgment was appropriate in the proceeding below because no "defendant" objected to the release of the materials. Although the district court mentioned this fact in its order, J.A. at 149, the realistic alignment of the parties must be considered. Reporters Committee was formally a plaintiff in the consolidated cases, as was Woods, but it was in fact the party in an adversary relation with Woods in this matter.



Section 2101 of Title 44 of the United States Code, however, defines historical materials to include "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value." While this definition details with some particularity the meaning of the term "materials," it provides little if any assistance in deciding which of these materials are of historical value. The deliberate vagueness of the section suggests that Congress intended this decision to be made in the context of surrounding circumstances, and specifically with reference to the purposes of the Materials Preservation Act. This conclusion is supported by the legislative history of the Act, which also indicates that Congress intended the Administrator's regulations to develop guidelines, based in part on the experiences of Watergate, to determine which materials would be controlled by the Act.<sup>8</sup>

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<sup>8</sup> Section 104(a) of the Act requires the Administrator, in formulating regulations, to take into account several factors, including the need to inform the public about Watergate (§ 104(a)(1)), the need to provide public access to materials of "general historical significance" (§ 104(a)(6)), and "the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in [§ 104(a)(1)] and are not otherwise of general historical significance." § 104(a)(7). *See Nixon v. Richey*, 513 F.2d 430, 444 (D.C.Cir. 1975). Senator Nelson, a sponsor of S.4016, which would eventually become the Materials Preservation Act, stated that, since it would be "difficult within a short time to draft regulations governing public access" which would accommodate these competing interests, the Administrator's regulations, together with their accompanying report, would "recommend which materials of historical significance should be retained." 120 CONG. REC. 33851 (1974). Senator Ervin, another of the Bill's sponsors, stated that in drafting these regulations the Administrator should call upon the ad-

The criteria Ms. Filippini used to compile List F, however, were developed before the passage of the Act and before the promulgation of the Administrator's regulations. Exhibit I, which Ms. Filippini states sets forth the criteria she used in gathering List F, is dated August 9, 1974;<sup>9</sup> indeed, Ms. Filippini is quite frank in stating that her judgment was based "on the same criteria used in collecting Nixon Presidential Materials from other White House staff members and staff offices prior to and since August 9, 1974." J.A. at 89. We find that these criteria are not consonant with the purposes of the Materials Preservation Act. For example, § 104(a)(1) of the Act speaks of "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term Watergate. . . ." See *Nixon v. Administrator of General Services*, 433 U.S. 425, 452-53 (1977).

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vice of the Special Prosecutor's office. *Id.* at 33856. When Congressman Brademas, one of the primary supporters of S.4016 in the House, was asked why the Administrator, who had entered into the original argument with Mr. Nixon, see note 3 *supra*, should now be trusted to draft such important regulations, the Congressman replied:

It is precisely because of the apprehension of the members of the committee with respect to that particular point that the bill contains language which directs the Administrator to submit to Congress, within 90 days after the enactment of the measure, regulations which would provide public access to the materials.

Secondly, it is precisely because we shared that apprehension that those regulations would not go into effect without an opportunity for both the House and Senate to review the regulations and to exercise a veto if we disapprove of them.

*Id.* at 37903.

<sup>9</sup> The Act was passed by Congress on December 10, 1974, and was signed into law on December 19. The Administrator's regulations became effective on December 16, 1977.

Many of the abuses of power involved in Watergate were "unrelated to any official duties," yet under the criteria of Exhibit I it appears that reference to such activities in correspondence would be labeled "personal" and found to be not Presidential historical materials. Similarly, the criteria employed by Ms. Filippini would apparently categorize as personal and not Presidential historical materials the "daily appointment books or log books" that constituted such important evidence in the Watergate affair. Moreover, § 104(a)(6) of the Act speaks of "the need to provide public access to those materials which have general historical significance." The criteria of Exhibit I do not articulate this concern.

Our conclusion that the criteria of Exhibit I are not compatible with the purposes of the Act is supported by the regulations promulgated by the Administrator. Under these regulations the Administrator will specifically retain control over materials related to abuses of governmental power popularly identified under the generic term "Watergate."<sup>10</sup> See 42 Fed. Reg. 63628 (1977) (to be codified in 41 C.F.R. § 105-63.401-5). The regulations

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<sup>10</sup> The regulations define the term "abuses of governmental power popularly identified under the generic term 'Watergate'" to mean:

those alleged acts, whether or not corroborated by judicial, administrative or legislative proceedings, which allegedly were conducted, directed, or approved by Richard M. Nixon, his staff or persons associated with him in his constitutional, statutory or political functions as President, and (1) are or were within the purview of the charters of the Senate Select Committee on Presidential Campaign Activities or the Watergate Special Prosecutor Force; or (2) are circumscribed in the Articles of Impeachment adopted by the House Committee on the Judiciary and reported to the House of Representatives for consideration in House Report No. 93-1305.

42 Fed. Reg. 63626 (to be codified in 41 C.F.R. § 105-63.104(c)).

also have a more inclusive definition of "Presidential historical materials" than that expressed in Exhibit I:

(a) *Presidential historical materials.* The term "Presidential historical materials" (also referred to as "historical materials" and "materials") shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory duties or political activities as President and retained or appropriated for retention as evidence of or information about these duties and activities. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stocks of publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.

(b) *Private or personal materials.* The term "private or personal materials" shall mean those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities, and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff.

42 Fed. Reg. 63626 (1977) (to be codified in 41 C.F.R. § 105-63.104(a), (b)). Whereas the criteria of Exhibit I would require that that "correspondence unrelated to any *official* duties" be returned to Ms. Woods, the regulations would classify as "private or personal materials" only those "having no connection with . . . constitutional or statutory duties or *political activities* . . ." The "daily appointment books or log books" that the criteria of Ex-



hibit I would categorize as personal would, under the regulations, be considered at least *prima facie* Presidential historical materials, since they constitute "evidence of or information about" such constitutional or statutory duties or political activities.

The criteria used in compiling List F thus not having been in accordance with statutory standards, the district court was incorrect in granting judgment on the pleadings. Since an elaborate regulatory scheme has now been established by the Administrator, the most appropriate disposition of this case is to dismiss appellee's suit without prejudice, and to remand her to her administrative remedies. Should those remedies prove unavailing, she will be able at that time to seek judicial review under § 105(a) of the Act.<sup>11</sup> Since appellee will not be harmed

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<sup>11</sup> Section 105(a) states:

The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceedings involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

Appellee argues that § 105(a) provides an independent "jurisdictional basis" for the district court to determine, apart from the Administrator's regulations, if "the papers here involved are the personal property of Ms. Woods and not Presidential historical materials." Brief for appellees at 8, 28-30.

Whether or not § 105(a) confers such jurisdiction, we hold that the district court should defer in the first instance to the Administrator's regulatory scheme. The Supreme Court

by dismissal, there is no reason for the district court to retain jurisdiction. See *United States v. Michigan National Corp.*, 419 U.S. 1, 5 (1974).

The judgment of the district court is therefore reversed and the case is dismissed without prejudice.

*So ordered.*

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has emphasized "the Act's requirement that the Administrator of General Services administer the . . . materials placed in his custody only under regulations promulgated by him providing for the orderly processing of such materials for the purpose of returning to [Mr. Nixon] such of them as are personal and private in nature . . . ." *Nixon v. Administrator of General Services*, 433 U.S. 425, 436 (1977). If § 105(a) were interpreted as authority for district courts to determine *ad hoc* whether particular items were "Presidential historical materials," it would constitute a virtual invitation to bypass the "orderly processing" of such items "under regulations promulgated by" the Administrator. We decline to interpret § 105(a) in a manner so contrary to the central import of the Act.

Although appellee has informed us by way of a motion for summary affirmance that the Administrator's regulations are presently under constitutional attack, see *Nixon v. Soloman*, C.A. No. 77-1395 (D.D.C.), we see no reason to alter our judgment. Even if the pending lawsuit were to delay the effective operation of the regulations, Ms. Woods has demonstrated no irreparable injury that will occur if she is required to wait, like the rest of the White House staff, until the regulations are fully operational. Indeed, over half the materials she seeks have already been returned to her. Particularly with respect to those materials that the parties have been unable to stipulate are "so lacking in historical or commemorative value or significance as to preclude any colorable claim that they fall within the reach of Section 101," the purposes of the Act will be best served if we defer to the authoritative definitions and procedures of the Administrator.



# SUPREME COURT OF THE UNITED STATES

LARRY PRESSLER, MEMBER, UNITED STATES  
HOUSE OF REPRESENTATIVES *v.* W. M.  
BLUMENTHAL, SECRETARY OF THE  
TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

No. 77-450. Decided January 16, 1978

The motion of James M. Jeffords et al. for leave to file a brief, as *amici curiae*, is granted.

The judgment is affirmed.

MR. JUSTICE REHNQUIST, concurring.

In joining the summary affirmance of the judgment of the District Court in this case, I think it important to point out that such affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits of the Ascertainment Clause question. The District Court decided that appellant did have standing to litigate this issue by virtue of the fact that he was a Member of Congress, but decided the issue against him on the merits. Our "unexplicated affirmance" without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question.





United States District Court for the  
District of Columbia

Civil Action No. 77-1733

MICKEY EDWARDS, MEMBER OF CONGRESS—OKLAHOMA  
ET AL., PLAINTIFFS

v.

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES,  
DEFENDANT

APPEARANCES

*Attorneys for Plaintiffs*

*Daniel J. Popeo*, Esquire; *Joel D. Joseph*, Esquire;  
*Paul D. Kamenar*, Esquire; Washington Legal Founda-  
tion, Washington, D.C.

*Attorneys for Defendant*

*David J. Anderson*, Esquire; *Steven I. Frank*, Esquire;  
*Brook Hedge*, Esquire; Attorneys, Department of Jus-  
tice.

Before BARRINGTON D. PARKER, *United States District  
Judge.*

Decided: February 20, 1978

BARRINGTON D. PARKER, District Judge:

MEMORANDUM OPINION

Article IV, Section 3, Clause 2, of the United States Constitution provides in part that the "Congress shall have Power to dispose of \* \* \* the Territory or other Property belonging to the United States." In this proceeding Representative Mickey Edwards and fifty-nine other Members of the House of Representatives appear

in their official capacity and seek vindication of their allegedly mandated right under Article IV to vote on the disposition of United States property within the Panama Canal Zone.

Currently pending before the Senate for ratification is a treaty, signed by President James Earl Carter, which would transfer certain real property in the Canal Zone from the United States to the Republic of Panama. Plaintiffs contest the procedure by which the President seeks approval of this treaty, and one other. Specifically, they request this Court to issue a declaratory judgment that the President's actions deprive the United States of property without the prior concurrence of the entire Congress, thereby thwarting them in the performance of their duties as directed by the Constitution; and that the President should transmit the treaties to the House of Representatives for its consideration under Article IV, thereby permitting plaintiffs to exercise their Constitutional and legislative duties regarding the disposition of American property within the Canal Zone. Jurisdiction here rests on sections 1331, 1361 and 2201 of Title 28 of the United States Code.

As an initial response, the defendant contends that the Court lacks subject matter jurisdiction either because the plaintiffs have no standing to sue or because the case presents a nonjusticiable political question. In addition, the President's counsel alleges that the complaint fails to state a claim upon which relief can be granted, since Congressional power under Article IV to dispose of United States property is not exclusive in the field of foreign relations, but rather concurrent with the President's Article II treaty making power. Accordingly, the defendant has moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The Court has considered the memoranda and oral argument of counsel and concludes that the plaintiffs lack standing to maintain this action. The defendant's motion must be granted and the complaint dismissed for lack of subject matter jurisdiction.

## BACKGROUND

The 1903 Hay-Bunau-Varilla Treaty between the United States and the Republic of Panama granted to the United States perpetual rights to "the use, occupation and control" of the Canal Zone.<sup>1</sup> This treaty, as amended,<sup>2</sup> provides the basis for the present American operation, maintenance and defense of the Canal. The treaty has been a source of constant conflict between the two nations. In 1964, President Lyndon Johnson took affirmative steps to initiate renegotiation, a goal which has been pursued by subsequent administrations.

Thirteen years of negotiations culminated on September 7, 1977, when President Carter signed two treaties: the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal.<sup>3</sup> Upon entry into force, the Panama Canal Treaty would abrogate prior treaties and the Republic of Panama would assume territorial sovereignty over all real property in the Canal Zone, including non-removable improvements thereon. The United States would continue to operate the Canal until the turn of this century, year 2000, at which time Panama would take control. Under the terms of the latter treaty, the United States and Panama would share permanent responsibility for maintaining Canal neutrality.

While there is some question as to the status of the interests to be transferred, the Court will assume for purposes of this motion to dismiss that the treaties concern property and territory of the United States, as those terms are used in Article IV of the Constitution.

President Carter submitted the treaties to the Senate for advice and consent to ratification in September, 1977. On February 3, 1978, after extensive hearings, the Senate Committee on Foreign Relations reported the treaties to the Senate; the Committee concluded that the Panama Canal Treaty can validly transfer property

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<sup>1</sup> Isthmian Canal Convention, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431.

<sup>2</sup> General Treaty of Friendship and Cooperation, March 2, 1936, 53 Stat. 1807, T.S. No. 945; Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, 6 U.S.T. 2273, T.I.A.S. No. 3297.

<sup>3</sup> For the text of the proposed treaties, see Dep't State Selected Documents No. 6 (Sept. 1977).



of the United States without the need for implementing legislation.<sup>4</sup> The Senate is currently conducting debate on the treaties; if approved and ratified, they will enter into force six months after the exchange of American and Panamanian instruments of ratification.

### THE QUESTION OF STANDING

To cross the jurisdictional threshold of the federal court, the Representatives must first demonstrate their standing to seek a declaration that President Carter's submission of the treaties only to the Senate is unconstitutional. Although legislator interests and injuries are often specialized, there are no distinct standards for determining Congressional standing questions. To resolve the ultimate issue of whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976), the Court must pursue a series of inquiries. Only recently, in *Harrington v. Bush*, 553 F.2d 190, 205 n.68 (D.C. Cir. 1977), our Court of Appeals distilled four separate such questions from the Supreme Court decisions developing the standing doctrine. First, does "the irreducible constitutional minimum" of a concrete injury in fact exist? Second, are the interests asserted arguably within the zone of interests protected by the relevant statute or constitutional provision? Third, is the injury asserted causally related to the allegedly illegal action of the defendant? Finally, is the injury "likely to be redressed by a favorable decision?"

This Circuit has developed a relatively comprehensive body of law on the subject of legislator standing. A definite line between legislators with and without a sufficient injury in fact has been drawn. While the sixty plaintiff House Members do not fall neatly on either side of that line, a discussion of the division will lay the foundation for a comparative analysis.

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<sup>4</sup> Senate Comm. on Foreign Relations, Report on the Panama Canal Treaties, Exec. Rep. No. 95-12, 95th Cong., 2nd Sess. 65-69 (1978).

A Congressman whose vote has actually been nullified has standing to challenge the action that has led to such nullification. In *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), the court held that Senator Edward Kennedy had standing to challenge the constitutionality of the President's exercise of a "pocket veto" on a bill passed by Congress. The court emphasized that the pocket veto had both nullified the effect of his prior vote for the bill and had circumvented his opportunity to cast an overriding vote, thus causing a specific injury to his "official legislative authority." Because a decision as to the constitutionality of the pocket veto would determine whether the bill would become law, the court was not playing a solely advisory role, outside the scope of its Article III powers. *See also Coleman v. Miller*, 307 U.S. 433 (1939).

In contrast to *Kennedy*, the court has been reluctant to find standing where a legislator is not seeking viability for a specific vote already cast or a constitutionally prescribed follow-up vote. In the central case of *Harrington v. Bush*, House Representative Michael Harrington challenged the legality of certain activities of the Central Intelligence Agency (CIA). Citing the key language of *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), plaintiff based standing on his belief that a judicial declaration of the illegality of the activities would "bear upon" his legislative duties of impeachment and appropriations. The court unequivocally rejected the *Mitchell* relevance test and held that a Congressman who seeks a declaratory judgment of executive illegality must allege a "particular concrete injury." 553 F.2d at 210. Congressman Harrington did not meet this initial barrier, because he could point to no action by CIA officials that had undermined his vote. Indeed, the "legislative process [was] operating in an unimpeded manner," as the House was considering numerous bills and resolutions relating to the CIA. 553 F.2d at 200 n.41. In addition, since a judgment either way as to the legality of CIA activities would only assist Congressman Harrington in his general legislative duties, rather than deciding the fate of specific legislation, a judgment could serve solely an advisory function.

The importance of the *Harrington* "particular concrete injury" test was buttressed in the companion case of *Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977). Senator Lee Metcalf sought to enjoin the National Petroleum Council from functioning as a federal advisory council because its advice was allegedly influenced by special interests, in violation of two federal statutes. He claimed that his duties as an individual legislator and as a subcommittee member to take "effective legislative action to correct the illegalities he perceive[d]" were impaired by receipt of biased information from the defendant. Finding this to be a generalized grievance with an unspecified prospective impact, rather than an injury in fact, the court denied standing and noted that Senator Metcalf was free to develop sources of unbiased information to assist him in his legislative role.

The Court of Appeals also used *Metcalf* to clarify the distinction between the *Harrington* and *Kennedy* situations. Where a legislator's "official influence upon the legislative process" is not impaired by alleged illegality, though one channel of power or source of information may be hampered, he has no standing to entangle the federal court in his general legislative difficulties. A legislator in the *Kennedy* type case has standing, however, where the court can limit its inquiry to the "discrete aspect" of the process by which a bill becomes law, meaning the original vote and post-enactment events denying a bill's legal status. 553 F.2d at 189 n.127.

#### PLAINTIFFS' STANDING

The Representatives describe, somewhat ambiguously, two classes of injury for which they seek redress. Their complaint alleges that the President's failure to submit the treaties to the House has infringed their "constitutional and legislative responsibilities to dispose of property belonging to the United States." This allegation appears to encompass not only the injury inherent in actual transfer of Canal Zone property without House approval, but also the President's submission of the treaty property provisions to the Senate only. In the opposition to the motion to dismiss, they also assert a

"constitutional interest in protecting the integrity of their votes" on specific bills and resolutions now pending before the House, which concern substantive and procedural aspects of Panama Canal property disposition.<sup>5</sup>

The two concepts of injury warrant separate discussion. Because the latter presents the less difficult issues, the Court will first address that concept of injury.

#### SPECIFIC BILLS AND RESOLUTIONS PENDING BEFORE THE HOUSE

Plaintiffs' claim that President Carter's actions encroached upon their right to vote effectively on specific bills and resolutions pending before the House represents an attempt to come within the holding of *Kennedy v. Sampson*. The *Kennedy* court, however, was not impressed with the specificity of legislation upon which a legislator hoped to vote. Rather, the controlling factor was that Senator Kennedy's actual vote on a bill had been nullified by improper executive action; impairment of his future vote was inextricably linked to his original one. As confirmed in *Metcalf*, where the plaintiff emphasized the specificity of the subject matter involved, "[i]t is the *injury* which must be specific, *not* merely the interest on which the injury has been inflicted." 553 F.2d at 188.

However specific the bills and resolutions here, plaintiff Representatives are in no stronger a position for standing than were Senator Metcalf or Representative Harrington. President Carter has not frustrated or prevented them from voting. If the relevant bills and resolutions are snared in the legislative process, they have only their colleagues and themselves to blame. See *Reuss v. Balles*, 73 F.R.D. 90, 94-97 (D.D.C. 1976), *appeal pending*, No. 77-1012 (D.C. Cir.). The Court recognizes that plaintiffs might welcome a judicial declaration of the constitutional status of the defendant's actions before considering or voting on the legislation now pending. However, since a judicial decision concerning

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<sup>5</sup>Three bills (H.R. 9815, H.R. 8957, H.R. 8790) and eleven resolutions were all introduced in the 95th Congress, 1st Session.



the bills and resolutions would not determine whether the territory is to be transferred or even whether the House merits a vote on the actual Panama Canal Treaties, such a decision would exceed the Court's Article III powers.

The Court also recognizes that a Senate vote on the treaties could undermine the effectiveness of a House vote on the now pending bills and resolutions. In response to this dilemma, however, the Court points out that it would be improper for the federal judiciary to attempt to schedule the legislative process. Nor will the Court attempt to monitor the interrelationship of the House and Senate, particularly since the latter body is not a party to this litigation.

#### PANAMA CANAL TREATIES

The heart of this action is plaintiffs' alleged constitutional right to cast an effective vote on the treaty provisions transferring American territorial control of Canal Zone property. The asserted injury to the Representatives arises from the President's attempt to modify the status quo of property and territory ownership, as established by past treaties and legislation, without a House vote. This injury would magnify in the immediate future if the treaties are ratified. So articulated, the plaintiffs have suffered an injury to their role in the legislative process under Article IV. However, to support standing, they must further demonstrate a concrete and nonspeculative injury in fact to their official roles as legislators.

Plaintiffs' alleged injury does not fall into either of the legislative standing categories. They concede that defendant has not nullified the effect of any votes already cast by them,<sup>6</sup> as happened in *Kennedy*. Unlike

<sup>6</sup> At the oral argument, counsel for plaintiffs suggested that the President's action undermined Congressional enactment of Article V of the 1955 Panama treaty, which provides for the transfer of certain real property to the Republic of Panama "subject to the enactment of legislation by the Congress." A legislator who voted for a statute which has been correctly enacted does not have standing on that basis alone to ensure enforcement of the legislation. See *Metcalf* at 185; *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th

the circumstances in *Harrington*, they have not brought this suit for guidance on general appropriations or potential impeachment proposals; their injury is not a lack of unbiased information "bearing upon" their legislative roles.

Plaintiffs argue that their situation is more akin to that presented in *Kennedy* than in *Harrington*. The effectiveness of Senator Kennedy's vote was impaired by executive action taken after his vote was cast; the effectiveness of their votes has been aborted by Presidential action circumventing the role of the House. The difference in timing aside, plaintiffs claim that their disenfranchisement is equally as real and objective.

In essence, the House Members are asking the Court to interpret Article IV to mean that the House is entitled to vote on the same provisions concerning property disposition at the same time as the Senate. Such an interpretation would contradict the *Kennedy* standing requirement that a legislator must demonstrate interference with his official influence on the legislative process. Without attempting to usurp plaintiffs' legislative functions, the Court notes that they have been and are now free to introduce, consider and vote on legislation paralleling the Panama Canal Treaty, to determine if a majority of the House approves transfer of territorial sovereignty.<sup>7</sup> This approach is admittedly more difficult than voting on provisions submitted by the President to the House. However, since the issue is whether the President has usurped plaintiffs' constitutional right to vote, the comparative facility of different methods of voting is not determinative. Just as in *Harrington* and *Metcalf*, the fact that legislators have been ham-

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Cir. 1975; *McRae v. Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976). The logic of this rule, which serves to limit Congressional intervention in every case interpreting federal laws, applies to enacted treaties as well as statutes.

<sup>7</sup>The Court is in no way implying that plaintiffs would have standing if the House had passed a resolution on the proper procedural role of the House or on the merits of Canal Zone territorial sovereignty transfer. See the discussion of institutional and derivative standing in *Harrington* at 199 n.41.

pered in their legislative functions is not sufficient to show a nonspeculative concrete injury in fact.

Plaintiff Representatives apparently would distinguish *Harrington* on the grounds that Congressional information sources and CIA appropriations are matters more amendable to legislative control than disposition of Canal Zone property. They would point to the "shall vote" language of Article IV to protect their right to have the relevant provisions submitted to them by the President. Precedent, however, demonstrates that plaintiffs overestimate the importance of Article IV to their claims of standing.

This court rejected a similar claim based on Article IV in *Public Citizen v. Sampson*, 379 F. Supp. 662 (D.D.C. 1974), *aff'd without opinion*, 515 F.2d 1018 (D.C. Cir. 1975), where several congressmen challenged General Services Administration (GSA) regulations which authorized agencies to grant rights to patents and inventions developed with federal funds. The court dismissed their complaint for lack of standing, finding that promulgation of the regulations did not cause an injury in fact to plaintiffs in their legislative roles, since it was "beyond peradventure that plaintiff Congressmen could tomorrow propose legislation regulating the contractual authority" of GSA. 379 F. Supp. at 667.

Admittedly, patents do not rival territorial sovereignty over the Panama Canal Zone in importance. However, an argument that the Court should not apply the holding in *Public Citizen* to this more consequential case proves too much, given that the sovereignty issues here owe their dramatic significance to the foreign policy context in which the case arises. This is not to say that interpretation of Article IV, where that Article allegedly conflicts with the President's treaty making powers, is a nonjusticiable political question. Rather, considering that plaintiffs do have legislative avenues open to them in a situation rooted in international relations, the Court justifiably follows the precedent of *Public Citizen* to find that plaintiffs have not demonstrated concrete injury in fact. Nor is the Court saying plaintiffs are not entitled to a judicial remedy because they can pursue alternative legislative solutions. In-

stead, because their official powers as Representatives remain undiminished in substance, they have not suffered a particularized, nonspeculative injury in their capacity as legislators. See *Metcalf*, 553 F.2d at 189 & n.129.

In a second relevant case, *Pressler v. Simon*,<sup>8</sup> Representative Larry Pressler alleged that two acts establishing procedures for adjusting congressional pay rates, without the traditional requirement of specific legislation, violated the Article I, Section 1, requirement that Congressmen "shall receive a Compensation for their Services to be ascertained by law." Before dismissing the case on the merits, the court found that Representative Pressler did not have an injury in fact for standing purposes at least until his salary had actually been adjusted by operation of the acts. Until that time, even though nonlegislative salary recommendations were imminent under the acts, any injury was "far too speculative" to support standing.

Plaintiff Representatives here allege a similarly speculative injury. True, like Representative Pressler, they have a legitimate interest in their alleged constitutional mandate to vote. However, the Court cannot focus on an impairment to that interest until exact contours of the injury are defined, until an event equivalent to the automatic adjustment in Representative Pressler's salary has occurred.

The President did submit the treaties to the Senate in September of 1977, thereby revealing his decision to bypass a House vote. However, many contingencies remain between submission and entry into force of the treaties. The House is free to vote on and perhaps approve property provisions parallel [sic] to those of the treaties. The Senate may yet enact treaty amendments requiring full congressional authorization for transfer of American property.<sup>9</sup> The Senate could disapprove the

<sup>8</sup> 428 F. Supp. 302 (D.D.C. 1976) (three-judge court); *vacated and remanded for reconsideration in light of new legislation*, 431 U.S. 169 (1977); *Order reinstating prior opinion*, C.A. No. 76-782 (D.D.C. July 19, 1977); *dismissal aff'd*, 46 U.S.L.W. 3452 (Jan. 17, 1978).

<sup>9</sup> Two such amendments were introduced in the Senate Foreign Relations Committee: Amendment No. 16 to Ex. N, 95-1 (Jan. 26,



treaties or require amendments unacceptable to the Republic of Panama. Diplomatic problems could arise before or after exchange of instruments of ratification.

Postulating that these events will not come to pass, plaintiffs deny that a judicial opinion will be only advisory at this point in time. The Court is not prepared to second-guess the political contingencies inherent in the treaty making and legislative processes. Nor can the Court now assess plaintiffs' contention that ratification means a *fait accompli*, protected from judicial interference.

In short, the Court finds plaintiffs' injury too speculative to fulfill the injury in fact requirement of standing. A declaratory judgment on the constitutional right of the House to vote on the territorial sovereignty provisions would be abstract if the treaties met a political death in the House, the Senate or the executive branch. Insofar as plaintiffs' object to an actual transfer of American property without House approval, the listed contingencies grow in significance. *See Helms v. Vance*, No. 77-83 (D.D.C. Mar. 23, 1977), *aff'd mem.*, No. 77-1295 (D.C. Cir. May 3, 1977).<sup>10</sup>

## SUMMARY AND CONCLUSION

The sixty House Members have not suffered a concrete non-speculative injury in fact to their right to vote

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1978); Reservation No. 2 to Ex. N, 95-1. These were both tabled Report, *supra* note 4 at 123. They are, however, subject to reintroduction to the full Senate.

<sup>10</sup> *Helms* was a similar suit brought by Congressmen before the President had submitted any treaties to the Senate. In an opinion dismissing the suit as premature, the Honorable Thomas Flannery considered the contingency of Senate ratification to be a ripeness factor. In the instant case, as often happens in discussions of justiciability under Article III, this Court's finding that any injury to plaintiffs is too speculative for standing purposes overlaps with the ripeness doctrine.

The above discussion is equally applicable to plaintiffs' suggestion at oral argument that their right not to act with respect to disposition of American property in the Canal Zone is being injured. Any such injury will occur, if at all, only at the point in time when the property is actually transferred.

on the Panama Canal treaties. Possible legislative solutions are still available to them, both before and after any Senate ratification. They have not shown nullification of their official influence upon the legislative process. Further, the ultimate enactment of the territorial sovereignty provisions of the treaties is subject to many political contingencies, all unpredictable and uncontrollable by this Court. In the words of the Supreme Court,

[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

*Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 222 (1974).

Because plaintiffs have not met the "irreducible constitutional minimum" of a concrete injury in fact to their legislative roles, they do not have standing and no further inquiry is necessary. The Court lacks subject matter jurisdiction and the defendant's motion to dismiss must be granted.

Ordered accordingly.

BARRINGTON D. PARKER,  
*United States District Judge.*

Entered: FEBRUARY 20, 1978.

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United States District Court for the  
District of Columbia

Civil Action No. 77-1733

MICKEY EDWARDS, MEMBER OF CONGRESS—OKLAHOMA  
ET AL., PLAINTIFFS

*v.*

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES,  
DEFENDANT

ORDER

On the basis of the Memorandum Opinion entered in the above-entitled action on this date, it is this 20th day of February, 1978,

ORDERED that the motion of defendant President James Earl Carter to dismiss for lack of subject matter jurisdiction is granted and the complaint is dismissed.

BARRINGTON D. PARKER,  
*United States District Judge.*





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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 78-1166

MICKEY EDWARDS

Member of Congress Oklahoma, et al., APPELLANTS

v.

JAMES EARL CARTER

President of the United States

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On Motion for Injunction Pending Appeal  
Motion for Summary Reversal, and  
Motion for Summary Affirmance

(D.C. Civil 77-1733)

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Argued March 10, 1978

Decided April 6, 1978



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# United States Court of Appeals

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On Motion for Injunction Pending Appeal,  
Motion for Summary Reversal, and  
Motion for Summary Affirmance

(D.C. Civil 77-1733)

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Argued March 10, 1978

Decided April 6, 1978

*Daniel J. Popeo*, with whom *Joel D. Joseph* and *Paul D. Kamenar* were on the motion for an injunction pending appeal and the motion for summary reversal, for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.



*Robert E. Kopp*, Attorney, Department of Justice, with whom *Steven I. Frank*, and *Brook Hedge*, Attorneys, Department of Justice, were on the motion for summary affirmance, for appellee.

Before: FAHY, *Senior Circuit Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion Per Curiam.

Dissenting opinion filed by *Circuit Judge MACKINNON*.

*Per Curiam*: This is an appeal from the District Court's dismissal of a challenge to appellee's use of the treaty power to convey to the Republic of Panama United States properties, including the Panama Canal, located in the Panama Canal Zone.<sup>1</sup> Appellants, sixty members of

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<sup>1</sup> Two treaties, signed by the chief executives of Panama and the United States, were presented to the Senate for ratification. The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal has now been ratified by the Senate, *see* note 2 *infra*. The Article conveying the Canal Zone properties to the Republic of Panama is contained in the Panama Canal Treaty:

PROPERTY TRANSFER AND ECONOMIC  
PARTICIPATION BY THE REPUBLIC OF PANAMA

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and free of liens and debts, except as the two Parties may otherwise agree.

2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the

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the House of Representatives, sought a declaratory judgment that the exclusive means provided in the Constitution for disposal of United States property requires approval of both Houses of Congress, *see* Art. IV, § 3, cl. 2, and that therefore the Panama Canal Zone may not be returned to Panama through the Treaty process, which invests the treaty-making power in the President by and with the advice and consent of two-thirds of the Senate present, *see* Art. II, § 2, cl. 2. Appellee contends

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United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include buildings and other facilities, except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama in accordance with paragraph 5(b) of Annex B to the Agreement in Implementation of Article IV of this Treaty at such time as such units are made available to the Republic of Panama.

(d) Upon termination of this Treaty, all real property and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal . . . .

that the Constitution permits United States territory to be disposed of either through congressional legislation or through the treaty process, and that therefore the President's decision to proceed under the treaty power is constitutionally permissible.

The District Court did not reach the merits of this controversy; rather, it dismissed the complaint for lack of jurisdiction after concluding that appellants lacked standing because they had failed to demonstrate injury in fact from the President's invocation of the treaty process. A notice of appeal and a request for a preliminary injunction pending appeal were immediately filed with this court. Appellee has moved for summary affirmance of the District Court's judgment either on the jurisdictional ground stated by the District Court or on the merits of appellants' contention; appellants have moved for summary reversal. We have heard oral argument and have considered the case on an expedited basis.<sup>2</sup> For the reasons appearing below, we affirm the dismissal of the complaint, not on the jurisdictional ground relied on by the District Court but for failure to state a claim on which relief may be granted.

## I

In addition to its argument on the merits, appellee has presented several substantial and complex challenges to the jurisdiction of the federal courts to adjudicate the merits of the constitutional question presented in this case. We refer not only to the contentions as to lack of standing, but also to the arguments that appellants' action is both premature and presents a nonjusticiable political question. Deciding only the jurisdictional issue

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<sup>2</sup> The Senate consented to The Neutrality Treaty on March 14, 1978. It is expected that the vote on the Panama Canal Treaty will occur in early April 1978.

before us could result in this court, or the Supreme Court, remanding the case for further proceedings either on the merits or on jurisdictional issues. Because the merits of this controversy present a pure question of law, with no need of a hearing for fact development, because these merits are so clearly against the parties asserting jurisdiction, and because the judgment appealed from was based on only one of several asserted grounds of lack of jurisdiction, we believe it is appropriate to proceed directly to the merits of this case. This conclusion is bolstered when the time constraints imposed by the immediacy of Senate action on the treaties are considered. See *Adams v. Vance*, No. 77-1960 (D.C. Cir. Jan. 17, 1978), at 8 n.7 and cases cited therein.

Consequently, the precise question we address is whether the constitutional delegation found in Art. IV, § 3, cl. 2 is exclusive so as to prohibit the disposition of United States property by self-executing treaty—*i.e.*, a treaty enacted in accordance with Art. II, § 2, cl. 2, which becomes effective without implementing legislation.

## II

Article IV, § 3, cl. 2 of the Constitution states in its entirety:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular States.

Appellants contend that this clause gives Congress exclusive power to convey to foreign nations any property, such as the Panama Canal, owned by the United States.<sup>3</sup>

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<sup>3</sup> In addressing the merits, we assume without deciding that the Panama Canal Zone real property which would be



We find such a construction to be at odds with the wording of this and similar grants of power to the Congress, and, most significantly, with the history of the constitutional debates.<sup>4</sup>

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conveyed by the Panama Canal Treaty is indeed property belonging to the United States. Appellee has not contended otherwise and neither party has briefed this issue.

<sup>4</sup> The Senate Foreign Relations Committee has thoroughly considered and rejected appellants' argument. That Committee reported the treaties with Panama to the full Senate by a 14 to 1 vote, and the one dissenting Senator did not dispute the power of the President, by and with the advice and consent of two-thirds of the Senate present, to transfer United States property. *See* EXEC. REPT. NO. 95-12 (95th Cong., 2d Sess., Feb. 3, 1978).

In addition to the American Law Institute's Restatement of Foreign Relations Law, *see infra*, other authorities in agreement with this conclusion include Professor Louis Henkin, *see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 159-60 (1965); Dean Louis Pollak, *see* 124 Cong. Rec., No. 8, at 5729 (95th Cong., Jan. 30, 1978); Professor Covey Oliver, *see* Hearings Before the Committee on Foreign Relations, Part IV, at 95, 103, 112-13 (Jan. 19, 1978); and Professor John Norton Moore, *see id.* at 89, 93-94. The Attorney General and the State Department Legal Advisor have also issued opinions that the Panama Canal may be disposed of through self-executing treaty. *See* Opinion of the Attorney General to the Secretary of State, Aug. 11, 1977; Hearings Before the Subcommittee on the Separation of Powers of the Senate Judiciary Committee, Part I, at 3-25 (July 29, 1977). Raoul Berger, in testimony before the Subcommittee on Separation of Powers of the Senate Judiciary Committee in the fall of 1977, expressed a contrary position. His thesis seems to be that the President and Senate cannot exercise under the treaty power any power granted to Congress, *see* Hearings Before the Subcommittee on Separation of Powers, (95th Cong. 1st Sess., Nov. 3, 1977). We agree with Professor Henkin that such a narrow view of the treaty power would, by "outlaw[ing] treaties on matters as to which Congress could legislate domestically," "virtually wipe out the treaty power." L. HENKIN, *supra*, at 149.

[Continued]

The grant of authority to Congress under the property clause states that "The Congress shall have Power . . .," not that only the Congress shall have power, or that the Congress shall have exclusive power. In this respect the property clause is parallel to Article I, § 8, which also states that "The Congress shall have Power . . . ." Many of the powers thereafter enumerated in § 8 involve matters that were at the time the Constitution was adopted, and that are at the present time, also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. 1, § 8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce. It thus seems to us that, on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit Congress to accomplish through legislation what may concurrently be accomplished through other means provided in the Constitution.

The American Law Institute's Restatement of Foreign Relations, directly addressing this issue, comes to the same conclusion we reach:

The mere fact, however, that a congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power.

ALI RESTATEMENT OF FOREIGN RELATIONS LAW (2d), § 141, at 435 (1965). The section of the Restatement re-

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<sup>4</sup>[Continued]

We note that Professor Henkin's treatise leaves no doubt but that he is in agreement with our position. The passage quoted by the dissent, as is realized upon a careful reading of the passage itself (with its references to "unilateral" Presidential action and "executive order[s]"), concerns the limitations upon the President's power to dispose of property through unilateral executive action. See note 24 *infra*.

lied on by the dissent merely states that the treaty power, like all powers granted to the United States, is limited by other restraints found in the Constitution on the exercise of governmental power (Rest. For. Rel. § 117).<sup>5</sup> Of course the correctness of this proposition as a matter of constitutional law is clear. See *Reid v. Covert*, 354 U.S. 1 (1957); *Geoffroy v. Riggs*, 132 U.S. 258 (1890); *Asakura v. Seattle*, 265 U.S. 332 (1924), also relied on by the dissent. To urge, as does the dissent, that the transfer of the Canal Zone property by treaty offends this well-settled principle—that the treaty power can only be exercised in a manner which conforms to the Constitution—begs the very question to be decided, namely, whether Art. IV, § 3, cl. 2 places in the Congress the *exclusive* authority to dispose of United States property.<sup>6</sup>

There are certain grants of authority to Congress which are, by their very terms, exclusive. In these areas, the treaty-making power and the power of Congress are not concurrent; rather, the only department of the federal government authorized to take action is the Congress. For instance, the Constitution expressly provides only one method—congressional enactment—for the appropriation of money:

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<sup>5</sup> Similarly, § 118(1) of the Restatement lends no support to the dissent's position because it is not even relevant to the issue before us. That section, consistent with *Missouri v. Holland*, 252 U.S. 416 (1920), indicates that the treaty power is broader than the power of Congress to enact legislation. The issue before us, on the other hand, is whether the treaty power extends to an area in which Congress, by virtue of Art. IV, § 3, cl. 2, does have power to enact legislation.

<sup>6</sup> It is important to understand the limited scope of this inquiry. If Art. IV, § 3, cl. 2 does in fact provide the exclusive means of property disposition, *i.e.*, by legislation, clearly a self-executing treaty would be a constitutionally impermissible alternative. As the dissent repeatedly indicates, the treaty power may not encroach on delegation made exclusively to Congress.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

Art. I, § 9, cl. 7. Thus, the expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable. Similarly, the constitutional mandate that "all Bills for raising Revenue shall originate in the House of Representatives," Art. 1, § 7, cl. 1, appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.<sup>7</sup>

These particular grants of power to Congress operate to limit the treaty power because the language of these provisions clearly precludes any method of appropriating money or raising taxes other than through the enactment of laws by the full Congress. This is to be contrasted with the power-granting language in Art. 1, § 8, and in Art. IV, § 3, cl. 2. Rather than stating the particular matter of concern and providing that the enactment of a law is the only way for the federal government to take

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<sup>7</sup> The dissent argues that because the power to declare war is exclusively reserved to Congress by Art. 1, § 8, so also must be the power to dispose of United States property, which power is granted to Congress in the same language as the war-making power. *Cf.* L. HENKIN, *supra*, at 160 n.\*\*. The *sui generis* nature of a declaration of war and the unique history indicating the Framers' desire to have both Houses of Congress concur in such a declaration, may place it apart from the other congressional powers enumerated in Art. 1, § 8 and in Art. IV, § 3, cl. 2. The history, discussed *infra*, of the constitutional convention and ratifying conventions with respect to the property clause and the treaty clause, on the other hand, clearly demonstrates the Framers' intention to allow disposition of the United States property through self-executing treaty. Moreover, while there are numerous instances in past treaty practice of the latter, we know of no instance in which the United States has been in a state of formally declared war without a congressional declaration thereof.



action regarding that matter, these provisions state simply that Congress shall have power to take action on the matters enumerated.

Thus it appears from the very language used in the property clause that this provision was not intended to preclude the availability of self-executing treaties as a means for disposing of United States property. The history of the drafting and ratification of that clause confirms this conclusion. The other clause in Art. IV, § 3 concerns the procedures for admission of new states into the Union, and the debates at the Constitutional Convention clearly demonstrate that the property clause was intended to delineate the role to be played by the central government in the disposition of Western lands which were potential new states. Several individual states had made territorial claims to portions of these lands; and as finally enacted the property clause, introduced in the midst of the Convention's consideration of the admission of new states, sought to preserve both federal claims and conflicting state claims to certain portions of the Western lands.<sup>8</sup>

The proceedings of the Virginia state ratifying convention provide further evidence of the limited scope of the property clause. During a debate in which the meaning of the clause was questioned, Mr. Grayson noted that the sole purpose for including this provision was to preserve the property rights of the states and the

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<sup>8</sup> The states' claims to unsettled Western (trans-Allegheny) regions were based on charters granted to them from Great Britain. Landless states argued that all Western lands should inure to the benefit of all states, *i.e.*, should be federal properties. See H. HOCKETT, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826*, 143-46 (1939); 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 461-66 (1937); 3 *id.* at 226-27.

federal government to the Western territory as these rights existed during the Confederation.<sup>9</sup>

This history demonstrates the limited concerns giving rise to the inclusion of Article IV § 3, cl. 2 in the Constitution. Whether or not this historical perspective might serve as a basis for restricting the scope of congressional power under the property clause, we view it as persuasive evidence for rejecting the claim that Article IV is an express limitation on the treaty power, foreclosing the availability of that process as a constitutionally permissible means of disposing of American interests in the Panama Canal Zone.

### III

The debates over the treaty clause at the Constitutional Convention and state ratifying conventions even more directly demonstrate the Framers' intent to permit the disposition of United States property by treaty without House approval. As originally reported to the Con-

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<sup>9</sup> This issue arose in a debate over the treaty clause that was not unlike the controversy before this court. Governor Randolph of Virginia stated that he could "conceive that neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty." He then argued that Art. IV, § 3 must be intended to protect against the dismemberment of the Union. Mr. Grayson replied that

[t]his clause was inserted for the purpose of enabling Congress to dispose of, and make all needful rules and regulations respecting, the territory, or other property, belonging to the United States, and to ascertain clearly that the claims of particular states, respecting territory should not be prejudiced by the alteration of the government, but be on the same footing as before; that it could not be construed to be a limitation on the power of making treaties.

3 ELLIOT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 504-05 (1907).

vention, authority to make treaties would have been entrusted to a majority of the Senate, without even Presidential participation.<sup>10</sup> However, this structure was thought to entrust too much power to the Senate, and the provision was subsequently amended to include an active Presidential role. Nonetheless, concern over the extensive scope of the power remained; particularly worrisome was the potential use of treaties as a means of effecting territorial cessions. Elbridge Gerry expressed this fear when he noted that "[i]n Treaties of peace the dearest interests will be at stake, as the fisheries, territory, etc. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed than on any other occasion."<sup>11</sup>

Concern about the sweeping character of the treaty clause led to several proposed amendments aimed at limiting its exercise. One amendment would have restricted this power by requiring that "no Treaty of Peace affecting Territorial rights should be made without the concurrence of two thirds of the (members of the Senate present.)"<sup>12</sup> For some delegates, however, merely increasing the level of Senate approval did not go far enough towards ensuring the proper exercise of the treaty power. Thus Connecticut's Roger Sherman proposed an amendment providing that "no such [territorial] rights should be ceded without the sanction of the Legislature."<sup>13</sup>

The Committee of Eleven, in whose hands this issue finally rested, rejected the proposed amendment for House

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<sup>10</sup> The account in the text is from 2 FARRAND, *supra*, at 540-49.

<sup>11</sup> *Id.* at 541.

<sup>12</sup> *Id.* at 543.

<sup>13</sup> 3 ELLIOT'S DEBATES, *supra*, at 500.

participation. Instead, a provision requiring a two-thirds Senate vote for the passage of all treaties was adopted. This choice clearly indicates the Framers' satisfaction with a supermajoritarian requirement in the Senate, rather than House approval, to serve as a check upon the improvident cession of United States territory.

That the two-thirds voting requirement did not affect the scope of the treaty power, but only made ratification of treaties more difficult, was clearly understood at the state ratifying conventions. An amendment proposed at the Virginia Convention provided that

no treaty ceding, contracting, restraining, or suspending the territorial rights or claims of the United States . . . shall be made, but in case of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.<sup>14</sup>

This, and a similar amendment offered at the North Carolina Convention,<sup>15</sup> evidence the broad interpretation given Article II, § 2 at the time of its inception.<sup>16</sup> As

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<sup>14</sup> *Id.* at 660.

<sup>15</sup> See S. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 63 (2d Ed. 1916); 4 ELLIOT'S *DEBATES*, *supra*, at 115.

<sup>16</sup> James Madison stated that "I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right." But he continued by noting "I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation." 3 ELLIOT'S *DEBATES*, *supra*, at 514. It appears, thus, that Madison was only formulating a well-recognized limitation on all of the constitutional powers, namely, that the exercise of constitutional delegations is restrained by the basic premises upon which the Union and the Constitution were created.



was true of the effort at the Constitutional Convention to introduce House participation in ratification of treaties, these state attempts to limit the treaty power as now contained in the Constitution also failed.

That those who framed and ratified the Constitution rejected several express attempts to limit the treaty power in the manner now urged by appellants greatly undermines the interpretation of that power they press upon us. From this evidence we conclude that the disposition of property pursuant to the treaty power and without the express approval of the House of Representatives was both contemplated and authorized by the makers of the Constitution.

#### IV

In view of the lack of ambiguity as to the intended effects of the treaty and property clauses, it may be surprising that judicial pronouncements over the past two centuries relating to these constitutional provisions are somewhat vague and conflicting. However, none of the actual holdings in these cases addressed the precise issue before us—whether the property clause prohibits the transfer of United States property to foreign nations through self-executing treaties. While, therefore, neither the holdings nor the dicta of these previous cases are dispositive of the case before us, we believe that in the main they support the conclusions we have stated heretofore.

One line of cases, involving the property clause, has arisen in the context of the division of power between the federal government and the states. In discussing this question, the Supreme Court has stated that Article IV “implies an exclusion of all other authority over [United States] property which could interfere with this right

or obstruct its exercise.”<sup>17</sup> We think that the most reasonable interpretation of such dicta, occurring in the context referred to, is that there is a lack of any constitutional basis for exercise of authority by individual states over United States property.<sup>18</sup> But that a specific

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<sup>17</sup> *Wisconsin Cent. R.R. Co. v. Price County*, 133 U.S. 496, 504 (1890).

<sup>18</sup> The dissent also relies upon *Alabama v. Texas*, 347 U.S. 272 (1954), which upheld the Submerged Lands Act of 1953, 67 Stat. 29. The reference in that case to Congress' power to dispose of property "without limitation" had no application to whatever limitation on Congress' power may be thought to result from use of the treaty power to accomplish disposal of property. Rather, the salient question in the case was whether Congress could grant to individual states indefeasible title to and ownership of certain resources under submerged marginal ocean lands. Thus, it appears that in referring to Congress' power "without limitation", the Court was holding that Congress' authority under Art. IV, § 3, cl. 2 embraces any disposition of property of the United States chosen by Congress. *See also* *Inter-Island Co. v. Hawaii*, 305 U.S. 306 (1938) (Under the Art. IV, § 3 powers to regulate, Congress has the authority to permit the Territory of Hawaii to impose taxes on petitioner's interstate business operations); *United States v. Celestine*, 215 U.S. 278 (1909) (Congress has power to retain federal jurisdiction over crimes committed by an Indian allottee on allotted land of an Indian reservation within the confines of a state); *Wisconsin Cent. R.R. Co. v. Price County*, 133 U.S. 496 (1890) (United States property is not subject to state taxation since enforcement of such a tax might result in states, instead of Congress, controlling the disposition of federal property, contrary to Art. IV, § 3, cl. 2); *Griffin v. United States*, 168 F.2d 457 (8th Cir. 1948) (county resolution declaring federally owned property open for grazing is invalid encroachment upon power delegated to Congress to regulate United States property).

Appellants also cite several cases that, while not dealing with federal-state relations, are nonetheless inapplicable here. *See* *United States v. Fitzgerald*, 40 U.S. (15 Pet.) 405 (1841) (an individual employee of the federal government is not empowered by his position to dispose of federal property without

congressional power is exclusive against intrusion by the states does not necessarily remove it from the sphere of the federal treaty power.

Another line of cases, involving the treaty clause, has arisen in the context of conveyances by the federal government to Indian tribes. The leading case on the power to convey such land by self-executing treaty is *Holden v. Joy*, 84 U.S. 211 (1872). In quieting adverse claims to certain lands west of the Mississippi which had previously been conveyed to the Cherokee nation by treaty, the Court had to determine the validity of the original grant to the Indians. The Court noted that

still it is insisted that the President and Senate, in concluding [a treaty for the transfer of property], could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress. . . . On the contrary, there are many authorities where it is held that a treaty may convey to a grantee good title to such lands without an act of Congress conferring it. . . .

*Id.* at 247. Because later congressional enactments repeatedly recognized the validity of the transfer, the Court

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further congressional authorization); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840) (congressional authorization to lease publicly owned lead mines to individuals is within constitutional delegation permitting "disposal" of United States property); *Sierra Club v. Hickel*, 533 F.2d 24 (9th Cir. 1970), *aff'd sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972) (Congress had the power to delegate regulation of the public lands to Executive officers).

In *Sioux Tribe v. United States*, 316 U.S. 317 (1942), cited by appellants, the Court held that the President could not by *Executive Order* dispose of public lands without congressional authorization. However, the unilateral nature of Presidential action by Executive Order renders that case inapposite here. Treaties involve not only Presidential action but senatorial participation as well.

found it unnecessary to rest its decision on this constitutional basis. However, the principle espoused is repeated in subsequent Supreme Court decisions.

The treaty in *Holden* involved a cession of non-Indian lands in return for tribal property. More common, however, were treaties in which Indian tribes ceded to the United States portions of their lands in return for, generally, some money and the creation of reservations. Usually these reservations consisted of tracts of territory originally occupied by the tribes and excepted by the treaty provisions from cession to the federal government. In order to fully comprehend the nature of the property interest transferred by the United States in these reservations it is necessary to understand the extent of the Indians' legal title prior thereto. The law early recognized the limited possessory rights of Indians in their territory. Ultimate title, that necessary to dispose of the property, rested solely in the hands of the federal government. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 542 (1823). The purpose of the reservation treaties was to transfer the Indian tribes' possessory rights to most of their property to the United States in exchange for a fee simple title in excepted reservations. Such treaties, then, clearly disposed of United States property interests.

Supreme Court cases involving these cessions have provided dicta similar to that of *Holden v. Joy*. In *Jones v. Meehan*, 175 U.S. 1 (1899), the Court considered the nature of Indian property rights acquired by "reservation." There, Chief Moose Dung of the Chippewas had "reserved" a certain tract of land in a treaty ceding tribal territory to the United States. He subsequently leased some of that property to various individuals. A challenge was made questioning the Chief's authority to engage in that transaction. As framed by the Court, the issue for resolution was whether the treaty merely confirmed Chief Moose Dung's original right of occu-



pancy in the reserved lands or whether the treaty granted a fee simple interest to the reservee. In holding that a fee simple passed under the treaty,<sup>19</sup> the court noted that “[i]t is well settled that good title to parts of the lands of an Indian tribe may be granted to individuals by treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.” 175 U.S. at 10. Thus the Court concluded that the treaty power alone was sufficient to transfer the underlying United States title in the reserved lands. In a similar situation the Court in *Francis v. Francis*, 203 U.S. 233, 241-42 (1906), stated that “this court and the highest court of Michigan concur in holding that a title in fee may pass by treaty without the aid of an act of Congress.”

As is true of most of the cases in which the Supreme Court has addressed the scope of the treaty power, *Holden*, *Jones*, and *Francis* involved the federal government’s interaction with Indian tribes. Because of the *sui generis* nature of the relationship between the Indian tribes and the federal government, it might be argued that these decisions are not dispositive.<sup>20</sup> We think, how-

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<sup>19</sup> *Jones v. Meehan* discussed and rejected as irreconcilable with later Supreme Court opinions the contrary views expressed by Attorney General Taney and Justice Nelson, which are also relied on by the dissent in the case before us. 175 U.S. at 12-14.

<sup>20</sup> Although this unique relationship has often been cited as a basis for distinguishing “Indian cases,” we question the applicability of the distinction to this case. This *sui generis* relationship is traditionally found in the context of individual rights, and it does not seem directly relevant to the scope of the treaty power vis-a-vis other sources of federal power. The Supreme Court long ago noted that “the power to make treaties with the Indian tribes is as we have seen, coextensive with that to make treaties with foreign nations.” *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876).

ever, that they are persuasively supportive of the authority of the President and the Senate under the treaty clause.

## V

While certain earlier judicial interpretations of the interplay between the property clause and the treaty clause may be somewhat confused and less than dispositive of the precise issue before us, past treaty practice is thoroughly consistent with the revealed intention of the Framers of these clauses. In addition to the treaties with Indian tribes upheld in the cases discussed above, there are many other instances of self-executing treaties with foreign nations, including Panama, which cede land or other property assertedly owned by the United States.<sup>21</sup> That some transfers have been effected through a congressional enactment instead of, or in addition to, a treaty signed by the President and ratified by two-thirds of the Senate present lends no support to appellants' position in this case, because, as stated previously, self-executing treaties and congressional enactments are alternative, concurrent means provided in the Constitution for disposal of United States property.

For instance, the Treaty with Panama of 1955, 6 U.S.T. 2273, transferred certain property (a strip of water and other sites within the Canal Zone) to Panama without concurring legislation by the Congress, while transfer of other property (owned by the United States but within the jurisdiction of Panama) was, under the terms of the treaty itself, dependent upon concurring legislation by the Congress. The decision to cast some but not all of

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<sup>21</sup> See, e.g., Florida Treaty with Spain of 1819, 8 Stat. 252 (256); Treaty Between the United States and Great Britain (Webster-Ashburton Treaty, 1842), 12 Bevans 82; Treaty between the United States and Japan (June 17, 1971), 23 U.S.T. 447, citations in note 22 *infra*.

the articles of conveyance in non-self-executing form was a policy choice; it was not required by the Constitution.

The transfer of property contemplated in the current instance is part of a broader effort in the conduct of our foreign affairs to strengthen relations with another country, and indeed with the whole of Latin America. The Framers in their wisdom have made the treaty power available to the President, the chief executant of foreign relations under our constitutional scheme, by and with the advice and consent of two-thirds of the members of the Senate present, as a means of accomplishing these public purposes.

We do not think it is relevant that many previous treaties couched in self-executing terms have been different in scope, dealing with boundary issues or otherwise ceding land which was claimed both by the United States and by a foreign nation.<sup>22</sup> We note first that it is hardly surprising that land transfers often involve

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<sup>22</sup> See, e.g., The Treaty with Mexico of 1933 (Rectification of the Rio Grande), 9 Bevans 976; The Treaty with Mexico of 1963 (Solution of the Chamizal Problem), 15 U.S.T. 21; The Treaty with Mexico of 1970 (changing position of Rio Grande to maintain boundary), 23 U.S.T. 371; Florida Treaty with Spain, *supra* note 21.

The dissent asserts that the treaties with Mexico cited herein were not self-executing. However, the only portions of these treaties dependent upon legislation were provisions in the latter two treaties requiring the United States to acquire certain property from private individuals prior to ceding it to Mexico. Because such acquisition necessitated appropriation of funds, implementing legislation was required, see pp. 9-10 *supra*. Similarly, the treaties with Panama also will require implementing legislation for the payment of annuities to Panama and certain other provisions in the treaties. See Hearings Before the Subcommittee on Separation of Powers, *supra*, at 20 (Department of State Statement of Legislation Required to Implement Proposed New Agreement with Panama).

boundaries or other disputed territory; indeed, it is in these situations that the decision to dispose of land would most often be made. Second, the grant of power to Congress in the property clause is not predicated on the territory disposed of being on a boundary or being the subject of conflicting claims. Thus we do not understand the basis for appellants' argument that, even if that clause does not provide the exclusive means of disposing of disputed or boundary lands, it is the exclusive source of power for disposing of land concededly owned by the United States. If the status of the land has any bearing on whether it may be conveyed without congressional enactment under the property clause,<sup>23</sup> it would seem to cut in a direction contrary to that urged by appellants, for the Western lands that were the focus of the property clause were the subject of conflicting claims by the states and the federal government.

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It is important to the correct resolution of the legal issue now before us not to confuse what the Constitution permits with what it prohibits. In deciding that Article IV, § 3, cl. 2 is not the exclusive method contemplated by the Constitution for disposing of federal property, we hold that the United States is not prohibited from employing an alternative means constitutionally authorized.<sup>24</sup> Our judicial function in deciding this lawsuit is confined to assessing the merits of the

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<sup>23</sup> It is exceedingly difficult to understand why the constitutionality of utilization of the treaty process should depend on whether the nation to which the land is conveyed has previously "claimed" such land.

<sup>24</sup> The dissent tends to obscure the distinction between the treaty power and presidential power asserted to be inherent in his authority to conduct our foreign relations. There is no doubt that the latter is more restricted than the former. As Professor Henkin notes:

[Continued]



claim of appellants that in the conduct of foreign relations in this matter, involving, *inter alia*, the transfer of property of the United States, the treaty power as contained in Article II, § 2, cl. 2, was not legally available. We hold, contrarily, that this choice of procedure was clearly consonant with the Constitution.

For the foregoing reasons, the judgment of the District Court dismissing the complaint is

*Affirmed.*

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<sup>24</sup> [Continued]

Whatever, then, [the President] might do by treaty or other international agreement . . . he cannot *unilaterally* regulate commerce with foreign nations, or make domestic laws punishing piracy or defining offenses against the nations or declare war. Equally, he cannot exercise, even for foreign affairs purposes, the general powers allocated to Congress: he cannot regulate patents or copyrights or the value of money, or establish post offices, or dispose of American territory or property. . . .

L. HENKIN, *supra* at 94-96 (1972) (emphasis added). A similar view is expressed in the 1940 Opinion of the Attorney General indicating that the President could not, by *executive agreement*, transfer "mosquito" boats to Great Britain. 39 Op. Atty. Gen. 484 (1940). Additionally, the State Department Guidelines, upon which the dissent draws, states that:

The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress. . . .

Department of State, 11 Foreign Affairs Manual § 721.2(a)2. Thus these too recognize that the President, when acting alone, has only limited power. However, we are not now faced with determining the permissibility of territorial cession by executive agreement. Before us is the much broader power established by the treaty clause of Art. II, § 2, cl. 2. Accordingly, these authorities are not applicable here.

MACKINNON, *Circuit Judge*, dissenting: The United States Constitution in Article IV, § 3, cl. 2<sup>1</sup> provides that "The *Congress* shall have power to *dispose* of . . . *property* belonging to the United States . . ." (emphasis added). Because of this specific constitutional provision, it is my opinion that the treaty clause<sup>2</sup> does not authorize the President to dispose of the large property interests of the United States in the Panama Canal Agreement without the approval of *Congress* to the transfer of the *property* involved. Yet the pending treaty with the Republic of Panama would violate the Constitution and disenfranchise the 435 members of the House of Representatives from voting as members of "the Congress" upon the proposal to "dispose of" eight billion dollars<sup>3</sup> worth of Canal "property belonging to the United States."<sup>4</sup> Since we are supposedly a participatory democracy, where the right and duty of the entire Congress to participate in that decision is clearly stated in the Constitution, and has been recognized by prior Presidents, it is almost impossible to understand the motivation for excluding the House of Representatives from exercising its constitutional authority.

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<sup>1</sup> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. CONST. art. IV, § 3, cl. 2.

<sup>2</sup> "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties . . ." U.S. CONST. art. II, § 2, cl. 2.

<sup>3</sup> SEN. EXEC. REPT. 95-12, EXEC. N, 95th Cong., 1st Sess. at 99 (Feb. 3, 1978) (hereafter "Committee Report").

<sup>4</sup> This opinion is confined to the Panama Canal Treaty and does not involve the Neutrality Treaty (for text of both agreements, see Appendix).

In my opinion, Senator Connally of Texas, when he was Chairman of the Senate Committee on Foreign Relations, correctly interpreted the Constitution when he stated in the Senate debate on the procedure to be followed in authorizing a transfer of United States property to Panama:

The House of Representatives has a *right* to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise.

88 CONG. REC. 9267 (December 3, 1942) (emphasis added).

Recognizing that the House of Representatives has a vote on the disposition of the Panama Canal does not operate as a restriction on the "treaty" power. The *Per Curiam* opinion is in error in treating this as a matter of "power" when it is merely a question of ratification procedure. Treaties may still be entered into by the President upon all subjects that are amenable to international agreement, and to become effective the "treaty provisions" must be ratified by two-thirds of the Senate; but if any treaty attempts to "dispose of . . . territory or property belonging to the United States . . ." and it is ratified by the Senate, Art. IV of the Constitution still requires the concurrence of the House of Representatives to "carry out the obligations *by the enactment of legislation.*" *Id.*, Senator Connally, 88 CONG. REC. 9270 (December 3, 1942) (emphasis added). In the transfer to Panama that was the subject of Senator Connally's remarks, the Senate by its vote acquiesced in that procedure and the House joined the Senate in voting to authorize the transfer of the property to Panama before the agreement was executed.

The net result is that unless it is previously approved by the "Congress," *i.e.*, the Senate *and the House of Rep-*

*resenatatives*,<sup>5</sup> the Constitution prohibits the effectuation of a self-executing agreement transferring the property in the Canal Zone belonging to the United States. The *Per Curiam* opinion reaches a different conclusion, but to my mind does not satisfactorily explain why this enormous disposition of property to the Republic of Panama should not recognize the proper role of Congress in such transfer as was followed in all prior transfers where the value of the property was infinitesimal compared to what is involved here. From its conclusion I thus respectfully dissent.

### I. IS A POLITICAL QUESTION INVOLVED?

At the outset, appellee defends on the theory that this case involves a political question which this court is without authority to decide. In other words, he contends that the treaty clause of the Constitution gives him the unchallengeable option to "dispose of . . . property belonging to the United States" without the approval of "the Congress" as set forth in Art. IV, § 3, cl. 2.<sup>6</sup> What this asserted defense amounts to is the claim that since he has already decided to proceed, and has taken certain steps that may violate the Constitution, the courts have no power to declare his conduct to be unlawful.

A question is not deemed political, however, when its resolution is committed to the courts by the Constitution. *Elrod v. Burns*, 427 U.S. 347, 351 (1976) (Brennan, J.); *Baker v. Carr*, 369 U.S. 186, 217 (1972). The issue here is plainly one that calls for a determination of which procedure is constitutionally required to approve an international agreement that will "dispose . . . of property belonging to the United States" of the value of eight

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<sup>5</sup> Since the merits of the case are reached, the discussion of standing is set forth in footnote 42, *infra*.

<sup>6</sup> See note 1 *supra*.



billion dollars (SEN. EXEC. RPT., EXEC. N, 95th Cong., 1st Sess., at 99 (Feb. 3, 1978) (hereafter "Committee Report"))).

The construction of treaties is the peculiar province of the judiciary. *Jones v. Meehan*, 175 U.S. 1, 32 (1899). This case presents a question for which there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." Instead, the question is purely judicial; it is committed by Art. III, § 2 to the courts established pursuant to Art. III, § 1 in which the "judicial power [is] vested." It is the type of controversy that the United States courts decide every day, and there is no lack of judicial and manageable standards for resolving it. Nor is the issue impossible for the courts to decide without a prior policy determination clearly involving non-judicial discretion. Since the issue is solely one of constitutional interpretation and both parties to the controversy are firmly committed to adhering to the dictates of the Constitution, and it is a relatively simple matter to do so, a proper declaration of the correct constitutional procedure would not embarrass or indicate any lack of respect due the two coordinate branches that are represented by the parties hereto. It should also be added that the issue is so clearly answered by the Constitution that the case does not involve any unusual need to adhere to any prior political decision. Therefore our authority to decide the issue is clear. *Baker v. Carr*, *supra*, 369 U.S. at 217.

## II. THE EXCLUSIVE POWER TO DISPOSE OF PROPERTY BELONGING TO THE UNITED STATES

No contention is advanced by this opinion that "Article II treaty power stops where the power of Congress begins," (Appellee Br., p. 12) but it is contended that in any international agreement the ratification or authorization procedure must conform to *specific* constitutional

provisions. Therefore, the specific provisions of the Constitution outside of Art. I, § 8, which designate "Congress" as the body to levy taxes (Art. I, § 7), appropriate money (Art. I, § 9), and dispose of Government *property* (Art. IV, § 3, cl. 2), require that international agreements that transgress into these areas can only become effective by enactments of Congress. The President cannot violate any of these provisions under the claimed need or desire for a self-executing treaty.

The issue we are confronted with at the outset concerns the proposal in the Panama Canal treaty (*see* Appendix) that would immediately replace the interest *in perpetuity* of the United States in the Panama Canal to act "as though it were sovereign" with a mere 21-year operational right, would immediately transfer the entire Panama Railroad and certain other valuable structures (Appendix, Art. XIII), and would eventually provide for the *automatic* transfer on December 31, 1999, of whatever interest the United States still retained in the entire Panama Canal. Appellee claims all this can be accomplished by the pending Carter-Torrijos treaty with nothing more than Senate approval; and that the participation of the House in those parts of the agreement that dispose of property belonging to the United States is not required and will not be sought. Such construction conflicts directly with the above-quoted provision of the Constitution and with past practices. A number of Supreme Court decisions also contain statements which recognize the exclusive power of *Congress* under Art. IV, § 3, cl. 2 to dispose of United States territory and property.

#### A. *The Supreme Court Decisions*

The decision in *Alabama v. Texas*, 347 U.S. 272 (1954), involved a motion by the States of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Submerged Lands Act of 1953. In

a *Per Curiam* opinion, the motions were denied on the ground that Art. IV, § 3, cl. 2 prohibited such suits by the states:

The power of *Congress* to dispose of any kind of property belonging to the United States "is vested in Congress *without limitation*." [Quoting *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537.]

347 U.S. at 273 (emphasis added).<sup>7</sup> Much earlier in *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872), the Court had stated:

"With respect to the public domain, the Constitution vests in *Congress* the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."<sup>8</sup> (Emphasis added.)

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<sup>7</sup> The *per curiam* understates the significance of many of the cases discussed here. For example, the majority concedes that *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840), does not involve a question of state-federal relations. While *Gratiot* did not involve the precise situation presented by this case, the principle relied upon therein—that the power to dispose of property rests exclusively with the Congress—should similarly, in my view, guide our disposition here. The majority seeks to distinguish away many of the Supreme Court's statements by noting that the context in which they were made involve state-federal relations and not separation of powers. *Gratiot*, among other cases, does not involve state-federal relations. While the holdings in those cases may not control our facts, it is submitted that the principle relied upon in those cases accurately states the proper construction of the provisions of the Constitution involved in this case.

<sup>8</sup> See *Sierra Club v. Hickel*, 433 F.2d 24, 28 (9th Cir. 1970), *aff'd*, 405 U.S. 727 (1972): "Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That congressional power is unlimited." The Court stated in *United States v. San Francisco*, 310 U.S. 16, 29 (1940): "The power

[Continued]

In *Wisconsin Central Railroad Company v. Price County*, 133 U.S. 496, 504 (1890), the Court remarked: "[Art. IV] implies an exclusion of all other authority over the property which interfere with this right or obstruct its exercise." This same conclusion was reached in *United States v. Celestine*, 215 U.S. 278, 284 (1909):

By the second clause of § 3, art. 4 of the Constitution, to Congress, and to it alone, is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." [Emphasis added.]

The Supreme Court in *Sioux Tribe v. United States*, 316 U.S. 317 (1942) also acknowledged the power of the Executive to withdraw lands from the territory subject to their being sold, but recognized that the power to dispose of the land rested in the Congress:

Section 3 of Article IV of the Constitution confers upon Congress *exclusively* "the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

316 U.S. at 324 (emphasis added). However, Congress had previously revealed its awareness of this practice and acquiesced in it (316 U.S. at 324-25).

*Geofroy v. Riggs*, 133 U.S. 258 (1890) remarks:

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<sup>8</sup> [Continued]

over the public land thus entrusted to Congress is without limitations." The Court has also stated:

*Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest.*

*United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840) (emphasis added).



The treaty power, as expressed in the Constitution, is in terms unlimited *except by those restraints which are found in that instrument* against the action of the government or its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

133 U.S. at 267 (emphasis added). In my view, one of the "restraints" to which *Geofroy* refers is the Art. IV, § 3, cl. 2 power vested in Congress to dispose of property. By treaty, the President could not sell or give away Alaska to another country. Similarly, in my view, the President by treaty cannot dispose of our property in the Panama Canal without authorization from *Congress*.

Another decision which discusses the treaty power is *Asakura v. Seattle*, 265 U.S. 332 (1924):

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "*so far as to authorize what the Constitution forbids*," it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy v. Riggs*, 133 U.S. 258, 266, 267; *In re Ross*, 140 U.S. 453, 463; *Missouri v. Holland*, 252 U.S. 416.

265 U.S. at 341 (emphasis added). Since the treaty power does not extend so far as to authorize what the Constitution forbids, the power does not extend so far as to permit the disposal of our territorial and property

interest in the Panama Canal without the approval of Congress as required by Art. IV, § 3, cl. 2.

If the scope of the treaty power were so broad as to permit such disposal, then the statements of the Supreme Court would be incongruent: if the treaty power were that broad, there would be a need to explain why Art. IV was not an express power limiting Art. II. Since there are no references to this possible conflict, it seems reasonable to state that the Court never conceived that the treaty power might be so broad as to permit disposition of property covered by Art. IV. These cases are wholly consistent with the Supreme Court's rulings concerning the treaty power.

Thus, the proper construction of the constitutional provisions is straight-forward and sensible. The treaty power is not limited by any express power in the Constitution *because it does not extend so far as to permit the disposition of property without an Act of Congress*. The power of Congress to dispose of property has no limit—in the language of *Celestine*, it resides in Congress alone; and thus, the treaty power is not a restriction on Congress, because it cannot operate to dispose of United States property.<sup>9</sup>

B. *Comparison of the Powers of Congress to Levy Taxes, to Make Appropriations and to Dispose of Property*

That Congress has exclusive power to dispose of United States property is also demonstrated by a comparative

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<sup>9</sup> When Jefferson was Secretary of State, he issued instructions on March 18, 1792 to the American Commissioners negotiating with Spain as to the boundary between Georgia and the Floridas, stating that the right to alienate even an inch of territory belonging to a member of the Union did not exist in the central government. American State Papers For. Rel., I 252. Jefferson was undoubtedly referring in part to the limitations imposed by Art. IV.

analysis of those delegated powers in which the right of Congress is admitted to be exclusive.

In overview, it is important to realize that the power to make treaties does not confer absolute authority upon the President and the Senate. It is a very broad power, but it is not unlimited. As a noted authority wrote before the form of the instant Panama Treaty became a national issue:

Broad assertions and extravagant adjectives, some of them supported by the Supreme Court, might leave the impression that the President can exercise virtually all the national political power in foreign affairs, at least concurrently with Congress. In fact, large areas have never been claimed by him [except now in the Panama Canal Treaty]. In principle, it would be difficult for a President to dispute that by vesting in Congress "all legislative Powers herein granted" and granting it a comprehensive array of specific powers, the Constitution barred the President from exercising these powers even as regards foreign affairs. Whatever, then, he might do by treaty or other international agreement . . . , he cannot *unilaterally* regulate commerce with foreign nations, or make domestic laws punishing piracy or defining offenses against the law of nations, or declare war. *Equally, he cannot exercise, even for foreign affairs purposes, the general powers allocated to Congress: he cannot regulate patents or copyrights or the value of money, or establish post offices, or dispose of American territory or property; he cannot enact necessary and proper laws to carry into execution the powers of Congress or even his own powers, for example, criminal laws to enforce an arms embargo. He cannot spend money on his own authority for foreign aid, or draw funds from the Treasury, without Congressional appropriation, to build an embassy. Presumably, the unexpressed lawmaking powers of Congress deriving from na-*

tional sovereignty are also generally denied the President: he cannot enact general immigration laws by executive order.

L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 94-96 (1972) (emphasis and matter in brackets added). The foregoing quotation does not support the assertion that Henkin's treatise agrees with the conclusion of the *Per Curiam* opinion. Cf. *Per Curiam* op., at 6 n.4.<sup>10</sup>

The *Per Curiam* opinion grasps at the word "unilaterally" in one sentence and asserts therefrom that Henkin in the next sentence is also speaking solely of the President's power to act "unilaterally." Such construction cannot be supported. Henkin, in the first sentence, is referring to *unilateral* action by the President that transcended what "he might do by treaty or *other international agree-*

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<sup>10</sup> The *Per Curiam* opinion states at note 4 that among the authorities agreeing with its position is Prof. Henkin. The quotation above is from a subsection entitled "Exclusive Powers of Congress." The subsequent section on "Concurrent Powers" does not contain a statement that the general powers addressed in the "exclusive power" section can be exercised concurrently by treaty. This opinion does not contend that the Executive lacks the power to make a treaty disposing of property but rather that such treaty requires an act of Congress to become effective. Henkin does not address this question directly, and his comments are not inconsistent with this position. See HENKIN, *supra*, at 149. The passage to which the majority refers as indicating that Prof. Henkin is in accord with its position begins with the statement: "Some obligations, it is accepted, cannot be executed by the treaty itself." Examples follow: appropriation of funds, enactment of criminal laws, and probably declaration of war. Nothing in that passage states or implies that the list is exhaustive.

It is not surprising that those promoting the present treaty also decide that they have power to accomplish the result they seek. It is ever thus with usurped authority. Cf. *Per Curiam*, at 6 n.4. The Senate precedent, however, is directly contrary. See Part IV, and particularly pages 41 to 44.



ment.” However, in the very next sentence, which is the critical sentence, Henkin shifts to deal with the President’s entire “foreign affairs purposes” and these unquestionably refer to his powers to enter into treaties, international agreements, as well as to act *unilaterally* and by “executive order” as referred to in the last sentence of the quoted paragraph. In this broad context Henkin states that the President “cannot . . . dispose of American territory or property . . .” It is absurd to suggest that this statement by Henkin was only intended to state that the President was prohibited from disposing of American territory or property by *executive agreement*, and not by treaty, since no person has ever suggested that American territory could be disposed of by a mere executive agreement with another nation, much less by *unilateral* action or executive order without congressional approval. Henkin’s statement with respect to the disposition of American territory and property thus included the President’s power to make treaties and international agreements as well as his power to act unilaterally and by executive order. These are all encompassed within “foreign affairs purposes.” It must thus be admitted that the present treaty is an attempt by the President to “dispose of American territory [and] property . . . for *foreign affairs purposes*”—and that Henkin states this cannot be done by treaty. Thus, Henkin is *not* “in agreement with [the *Per Curiam*] opinion.” *Per Curiam*, at 6 n.4. Not that Henkin is authoritative or binding—he is a highly respected professor.

The powers of government insofar as they may be exercised by treaty, are thus subject to the *specific* limitations imposed by the Constitution. First, Art. I, § 7, cl. 1, of the United States Constitution provides:

All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills.

Second, Art. I, § 9, cl. 7, provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Henkin has stated—and the appellee recognizes—that in a treaty the Executive cannot obviate these provisions by levying taxes or appropriating money from the United States Treasury.

In 1844 the President laid before the Senate a treaty he had negotiated which for at least three years would place the power to exceed certain maximum import duties beyond the power of Congress. The Senate, however, took the view that the constitutional method of imposing regulatory duties was by Act of Congress rather than by treaty. 2 HINDS' PRECEDENTS § 1532, at 998-1001. In a subsequent instance when the right of the Senate to act on a treaty was questioned, the Senate observed that the right of Congress to act by legislation was admitted and therefore the Report of the Senate Committee on Foreign Relations recommended that the treaty be amended by inserting: "This treaty shall not take effect until the same shall have been approved by the Congress." 2 HINDS' PRECEDENTS § 1533, at 1001-1002. The property transfer portion of the present treaty could be handled accordingly as all governments are on notice of the constitutional requirements of Art. IV.

Appellee also recognizes, as Henkin states, *supra*, that a Declaration of War is subject to the same limitation: it is beyond the President's *unilateral* power to declare war by edict. Likewise all seem agreed that "the United States cannot declare war" by treaty. HENKIN, *supra*, at 159-60. That conclusion, however, devolves from the provision of Art. 1, § 8, which states "Congress shall have

Power . . . To declare War." There is nothing in the Constitution which specifically forbids a President from declaring war to comply with a prior treaty. The Committee Report relies upon "the unique legislative history of the declaration of war clause" which supposedly "clearly indicates the power was intended to reside jointly in the House and Senate." Committee Report, at 74. This admits that the House of Representatives has a "share of the warmaking power," *id.* To read the clause as a concurrent power would unconstitutionally confer upon the President the power to declare war. However, since the President is commander-in-chief and represents the nation in our foreign relations, there is even less reason to read in the necessity for House participation in a declaration of war from the language of Art. I, § 8, solely the asserted history of the clause, than there is *to give effect to the separate constitutional limitation specifically requiring an Act of Congress to dispose of United States property as set forth in Art. IV, § 3, cl. 2.* This, unlike the war power, is one of the "general powers allocated to Congress" that HENKIN recognizes the President cannot exercise in a treaty. HENKIN, *supra*.

This then brings us to the placement of the power to dispose of Government property. This power is not specifically included in the general enumeration of powers set forth in Art. I, § 8, but it is undoubtedly one of the "general powers" "necessary and proper" for carrying into execution the previously enumerated powers and practically all other powers. In a separate provision outside Art. I, § 8 (like the taxing and appropriation provisions), Art. IV, § 3, cl. 2 imposes the requirement that "The Congress shall have Power to dispose of . . . Territory or Property belonging to the United States." (Emphasis added.)

In imposing a specific procedure *outside Art. I, § 8* for "Congress" to dispose of Government property, the Fram-

ers followed the same pattern as they did with respect to the other *general provisions* of the Constitution—levying taxes and making appropriations. Thus, Art. IV in requiring action by *both* Houses of Congress is cast in exactly the same mold as the tax and appropriation powers. Therefore, under the format of the Constitution, disposing of the United States' *property interests in the Panama Canal by a donation is entitled to action by the Congress to the same extent as would be an appropriation for the same amount which admittedly could only be accomplished by enactment of the "Congress."* It must thus be recognized that what is clearly required in the Carter-Torrijos Panama Canal Treaty is exactly what was done in the 1955 treaty involving the Panama Canal Zone: an Act of Congress was required to approve those provisions of the treaty which called for the disposition of United States property.<sup>11</sup>

To say that the Constitution is loose in this particular, and that it permits the President to have a free choice between bypassing the House, as is proposed here, and submitting the matter to the House and the Senate as was done in 1955, is to permit an important constitutional provision to be bypassed in the name of expediency—the exact motivation for which is not readily apparent. If there is any policy inherent in this decision, it should be to determine that at least a majority of the nation's representatives who have been elected on a one man-one vote apportionment support the property disposition portions of the treaty. Even a casual survey of the

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<sup>11</sup> At that time Congress, in accordance with the language of the treaty, did enact legislation enabling the transfers agreed to in the treaty to be perfected. Pub. L. 85-223, 71 Stat. 509 (August 30, 1957) had the purpose of "authoriz[ing] and direct[ing] the fulfillment of those provisions of the [1955 Treaty], which, *subject to authorization by the Congress*, provided for the conveyance of various lands and improvements to the Republic of Panama. . . ." (Emphasis added).



treaty (*see* Appendix) indicates that a great deal of implementing legislation is required and contemplated, and it has been recognized since 1796, *see* text at 24, *infra*, that the President and the Senate cannot foreclose the House of Representatives from exercising its independent constitutional authority in all respects.

There are two other obvious matters which appear to require implementing legislation that a treaty cannot assure:

(1) Art. III, § 5, requires the Panama Canal Commission (constituted by and in conformity with the laws of the United States, *see* Art. III, § 3) to pay the Republic of Panama for municipal services "ten million United States dollars . . . per annum." The treaty does not provide that this sum will be paid annually from Canal tolls, which in any event are covered into the United States Treasury, and an appropriation may be required. At page 9 the *Per Curiam* opinion states:

Thus, the expenditure of funds by the United States cannot be accomplished by self-executing treaty . . .

I agree. From the foregoing it also appears that this "self-executing treaty [does] require the expenditure of funds by the United States . . ." Hence, as the *Per Curiam* opinion states, the transfer "cannot be accomplished" and the treaty cannot be valid in its present form.

The treaty is self-executing in that it purports to create an annual liability of the United States for the sum of \$10 million. It appears, from note 22 at page 20 of the *Per Curiam* opinion, that the majority agree with this interpretation.

(2) Art. X, § 9 of the treaty also authorizes the affiliation of employees of the Panama Canal Commission with local and international unions, that they may negotiate collective bargaining contracts *with the Panama Canal*

*Commission, and that labor relations with employees "shall" be conducted in accordance with forms of collective bargaining established by the United States after consultation with employee unions.* This apparently makes a collective bargaining contract mandatory and in operation might require all Panama Canal workers to belong to a particular labor organization. It seems to be pure legislation with respect to the employee relations of the United States' employees and is very far-reaching. The briefs do not discuss the issue and no authority has been cited in support of this obvious legislative action.

It would thus appear to be extremely doubtful that the President is authorized to commit the United States to all of this procedure without approval of Congress.

C. *The Restatement of Foreign Relations Law and the Constitutional Requirements for the Disposition of United States Property*

The Restatement, Second, Foreign Relations Law of the United States, is hardly authority for the proposition that the power to dispose of property *concurrently* resides in Art. II and in Art. IV of the Constitution. The majority cite, as the section most strongly supporting the concurrent power notion, a sentence in comment (f) to section 141:

The mere fact, however, that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power.

*Per Curiam* at 7. In applying this broad single sentence to the specific constitutional power here vested in Congress, the majority ignore the general thrust of the Restatement.

The section of the Restatement which explains the relative boundaries of the treaty power and the powers

delegated to Congress is section 118(1). That section states that the power of Congress to enact legislation does not limit the treaty power; but in so providing, that section does not stand for the proposition that property belonging to the United States may be disposed of by treaty without approval by the Congress. Section 118(1) states:

An international agreement made by the United States as a treaty may deal with any matter as to which the United States has the *constitutional power* to make an international agreement under the rules stated in § 117. [Emphasis added.]

Comment (b) to that section states:

*b. Treaty power and power of Congress compared.* The treaty power of the United States is not limited by the extent of the powers delegated to the Congress by the Constitution. This follows from the fact that the treaty power is itself an independent power granted to the President and the Senate under the Constitution.

Nothing in section 118, however, supports a power to dispose of government "property" by treaty without the consent of the Congress. The Constitution vests that power in Congress by a separate provision. *In so doing, the grant to Congress of the power does not operate to impose a limitation on the power of the President to enter into international agreements but instead merely provides the necessary implementing procedure that must be complied with under the Constitution before certain international agreements become fully effective to accomplish their stated purpose.*

This opinion does not contend for its thesis, as the *Per Curiam* opinion attributes (rightly or wrongly) to Professor Raoul Berger, "that the President cannot exercise under the treaty power any power granted to

Congress . . ." *Per Curiam*, at 7 n.4. Admittedly such construction would "virtually wipe out the treaty power," as Henkin states. Furthermore, however, this opinion does not contend, as the *Per Curiam* opinion might conclude, that the President under his treaty power can exercise practically all the powers granted to Congress. That would, to paraphrase Henkin, "virtually wipe out the legislative power" in many recognized fields.

To be more specific, and to deal with the facts of this case, rather than attempting to write broad dicta, this opinion does contend that the treaty power cannot wipe out powers granted to Congress with the specificity indicated in Art. IV, § 3, cl. 2. Beyond that this opinion draws no line; but to my mind it seems clear, for the following and other reasons, that the placement of this separate paragraph in an article and section removed from Art. I, § 8 carries with it somewhat the same purpose to indicate exclusive congressional power that one derives from the location outside Art. I, § 8 of those provisions which impart exclusivity to Congress in the exercise of the taxing and appropriation powers.

The foregoing interpretation is consistent with the language of section 117 of the Restatement, which is referred to in section 118. Section 117 provides:

(1) the United States has the power under the Constitution to make an international agreement if

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(b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States.

Comment (d) states:

No power granted to the United States by the Constitution is unlimited. The power of the United States to make international agreements is not an exception to this rule. The extent of each power



grounded in the Constitution must be determined not only by the constitutional language granting it but also by the restrictions placed upon it *by other constitutional limitations*.

The comment seems to be addressed in part to such constitutional restrictions as were added by the Bill of Rights. For example, the President and the Senate could not cause a treaty to go into effect which abridges the freedom of speech of the American citizenry. The power of Congress to dispose of "property" fits precisely within this same classification but may have a stronger base in the intendment of the Framers since it was part of the original Constitution. Other constitutional limitations—here Art. IV, § 3, cl. 2—thus place restrictions upon the manner of implementing the treaty power: property cannot be disposed of without the approval of Congress. Section 117 is consistent with this.

Section 141(3), which is relied upon by the majority, does not disparage this analysis in any respect. That section provides:

A treaty cannot be self-executing under the rule stated in Subsection (1) and have the effect stated there *to the extent that it involves governmental action that under the Constitution can be taken only by the Congress*.

(Emphasis added.) By way of illustration, comment (f) states:

*f. Constitutional limitation on self-executing treaties.* Even though a treaty is cast in the form of a self-executing treaty, it does not become effective as domestic law in the United States upon becoming binding between the United States and the other party or parties, if it deals with a subject matter that by the Constitution is reserved *exclusively* to Congress. For example, only the Congress can appropriate money from the treasury of the United States. (Emphasis in original)

## Illustration:

8. The United States enters into a treaty with state A under which A agrees to cede a portion of its territory to the United States in return for payment of \$7,200,000. Advice and consent to the ratification of the treaty is given by the Senate and it is ratified by the President. The ratification does not have the effect of appropriating the \$7,200,000. *Further action to this effect must be taken by both Houses of Congress.* (Emphasis added).

The mere fact, however, that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power. Thus the fact that Congress has power to regulate commerce with foreign nations does not mean that the making of a self-executing treaty dealing with foreign commerce is precluded; in fact, many provisions in treaties dealing with foreign trade and commerce are self-executing.

The comment explicitly states that a treaty cannot be self-executing if it deals with a subject that is reserved exclusively to Congress. Art. IV, § 3 provides that Congress "shall," thus *exclusively*, dispose of property of the United States, just the same as "only the Congress can appropriate money from the treasury of the United States." The two powers, *i.e.*, dispose of property and appropriate money, are practically identical, and there is every reason to suspect that the Framers intended that both powers should be exclusively exercised by Congress. A disposition of Government property is to all intents and purposes an appropriation thereof. The Rules of the House of Representatives originally adopted in 1794 and amended in 1874 and 1896 have equated the appropriation of property with other appropriations:

All . . . bills making *appropriations of money, or property* or requiring such appropriation to be made . . . shall first be considered in a Committee of the Whole . . .

Rules of the House of Representatives, 95th Cong. (1977), Rule XXIII, ¶ 1, § 865 (emphasis added). In addition, Rule XIII, ¶ 1, § 742 speaks of

First. A calendar of the Committee of the Whole House on the state of the Union, to which shall be referred . . . bills of a public character directly or indirectly *appropriating money or property*.

(Emphasis added.) See 4 HINDS' PRECEDENTS § 4840, at 1050 (1907).

It is unreasonable to suggest that the Constitution is more concerned with the transfer of eight billion dollars of United States *funds* from the Treasury than with the transfer of eight billion dollars of United States *property*. And the potential earning power of the Canal makes it much more valuable even than eight billion in dollars.<sup>12</sup>

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<sup>12</sup> In footnote 7, the *Per Curiam* opinion states that "there are numerous instances in past treaty practice [of the] . . . disposition of United States property through self-executing treaty." The correctness of this statement is challenged. See Part VI hereof. There is no instance in the entire history of the United States that has been brought to our attention where any disposition of United States property even approaching the character and magnitude here involved was ever handled by a self-executing treaty.

Said footnote further states that "we know of no instance in which the United States has been *in a state of formally declared war* without a congressional declaration thereof." (Emphasis added.) That is a safe statement because a "*formally declared war*" can never exist without a congressional *declaration* thereof. Thus, the statement by its limitations *implicitly* carries its own proof. However, if the statement was intended to convey the impression that the President has never usurped the Congressional power to declare war, it must be recognized

It was observed in the discussion of the Supreme Court precedents that it is undisputed that the treaty power is not *limited* by the extent of the powers delegated to the Congress. Yet this does not mean that the general treaty power, so far as it exists, can overrun *specific* constitutional provisions. To state the proposition otherwise, the treaty power is not *so broad in the first instance* that it permits the disposition of property of the United States to be made other than in the manner specifically provided for by Art. IV, § 3, cl. 2. The treaty power clearly allows the President with the approval of the Senate to establish rights and obligations between this nation and other countries. However, the actual power to dispose of property *exclusively* rests in the Congress—which includes the House of Representatives, *i.e.*, a treaty cannot without the approval of both houses transfer *property* belonging to the United States. Justice Jackson, when as Attorney General in 1940 he advised President Roosevelt on the fifty destroyers transaction with Great Britain, held that the exchange for British bases was permissible because Congress has *previously* given the President such statutory authority to transfer unneeded naval vessels. He further advised, however, that since Congress had not by law given greater authority, the President was precluded from transferring *new* mosquito boats that were under construction. 39 OP. ATTY GEN. 484 (1940), 86 CONG. REC. 11355. This recognized that, even in those critical times, only Congress could authorize the disposition of United States property.

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that there is no difference in the format of the grant of that exclusive power to Congress from the grant to Congress of the power to dispose of territory and property. Therefore, by the same token, the President has no more power from the wording of the Constitution to dispose of United States territory and property than he does to declare war.



It is unquestioned that the *negotiation* of treaties rests solely in the President. As Justice Sutherland declared for the Court in 1936:

He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and the Congress itself is powerless to invade it . . .

*United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936). From the earliest times of our country, however, as reflected in a resolution adopted by the House of Representatives in 1796, it has been established:

That when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the *House of Representatives* in all such cases to deliberate on the expediency or in expediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.

5 ANNALS OF CONGRESS 782 (1967) (emphasis added). The House of Representatives in 1871 adopted a resolution to similar effect. CONG. GLOBE, 42d Cong., 1st Sess. 835 (1871). Senate Document 92-83, 92d Cong., 2d Sess., 488, notes that the early precedents which prohibited a treaty from circumventing the constitutional appropriation power of Congress (Art. I, § 9), have “*apparently been uniformly adhered to*” since 1796.<sup>13</sup>

The last paragraph of comment (f), from which the majority quote, only illustrates the necessity for analyz-

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<sup>13</sup> Citation is made to: S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 171-182; 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 549-552. See also H. Rept. 4177, 49th Cong., 2d sess. (1887). Cf. *De Lima v. Bidwell*, 182 U.S. 1, 198 (1901).

ing each case separately. This is precisely what the majority has not done. The *mere fact* that a congressional power exists is not, *by itself*, enough to render a treaty touching that power ineffective without legislative action. However, there are some congressional powers—appropriation, revenue, and *disposal of property*—which are so basic to the legislative function and are so intrinsically legislative that the treaty power cannot operate without the concurrent exercise of the congressional power. The power to dispose of property is a power with specific constitutional limitations, substantially identical to the appropriation power, and by the Constitution, like the appropriation power and the power to levy taxes, it rests exclusively with the Congress. The transfer of property to the Republic of Panama requires an Act of “Congress” pursuant to Art. IV, § 3, cl. 2. Section 141(3) is consistent with this approach.

In short, it does not appear that anything in the Restatement supports the proposition that the Panama Canal, the Panama Railroad, and the other United States property which the Carter-Torrijos Treaty proposes to convey to Panama, can be transferred except by the “Congress.” The treaty power is thus not unlimited and any treaty which disposes of substantial government property must, in that respect, be approved by both houses of Congress before coming into full force.

#### D. *Exclusive Language and the Placement of Article IV*

Appellee advances two other arguments for the proposition that the power to dispose of United States property rests concurrently in the Executive and the Congress. First, it is suggested that since the property disposal clause does not use the same “exclusive language” as the appropriations and revenue clauses, the power to dispose of property must be concurrent. *See* Appellee Br. at 9. Second, it is argued that the property disposal clause is

found in Art. IV which deals with state-federal and state-state relationships. This, it is argued, strongly suggests that the provision was intended to distribute power between the state and federal governments rather than among the three branches of the federal government. *Id.* This argument, however, is an incomplete answer. This is so because once a power is distributed between the state and federal government it must still be distributed between the three departments that constitute the three federal departments.

The first argument, that because the property disposal clause does not use, what is termed, "exclusive" language, the power rests concurrently in the Executive and the Congress, misapprehends the nature of Art. IV.

Of course the terminology by which a power is delegated to Congress is significant, and may be completely controlling in determining the scope of the President's treaty power; but each situation must be considered separately on its peculiar facts. *If any reasonably general statement were to be formulated for drawing the line at a point where the President's treaty power terminates, it would be at that point where the Constitution indicates that a legislative power was to be exercised.* That applies to the taxing and appropriation power. And it is submitted that the Constitution is addressing itself to legislative enactment in Art. IV when it confers the power on Congress "to dispose and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Certainly to "make all needful Rules and Regulations" refers to legislation. This clause is the source of the power that Congress exercised for more than a century in legislating for our territories, before they became states.<sup>14</sup> Providing

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<sup>14</sup> *E.g.*, *Dorr v. United States*, 195 U.S. 138, 149 (1904) ("We conclude that the power to govern territory, implied in the right to acquire it, and *given to Congress in the Consti-*

for the disposition of property of the United States must also be recognized as a close counterpart to enactments providing for the appropriation of money to the United States. The paragraph is thus referring throughout to action by Congress.

Thus, the fact that the property disposal clause does not refer specifically to the "House," or to a "law" as in the taxing and appropriation clauses, is not controlling, because it otherwise indicates that the *Congress shall* have power to *legislate* for the territories and property belonging to the United States. It further lays down a very broad restriction on all acts of the legislature, executive and judiciary, *i.e.*, that nothing said in the Constitution should be construed to prejudice any claims of the United States or of any State.<sup>15</sup>

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*tution in article 4, § 3, . . . does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated.*" [emphasis added]); *Benner v. Porter*, 50 U.S. 235, 240 (1850) ("[The territorial governments] are not organized under the Constitution, nor subject to its complex distribution of the powers of government . . . but *are the creations, exclusively, of the Legislative Department*, and subject to its supervision and control." [emphasis added]); *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828) ("Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers *Congress* 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.'" [emphasis added]).

<sup>15</sup> In the passage of *Henkin* relied upon the majority, the following statement appears in a footnote:

It has been suggested that treaties that deal with matters on which Congress could legislate could not be self-executing . . . In the numerous instances in which acts of Congress were held to supersede treaty provisions . . . ,



It is a gross understatement to construe the constitutional powers conferred by Art. I, § 8 and Art. IV, § 3, cl. 2 merely as though "these provisions state *simply* that Congress shall have power to take action on the matters enumerated." *Per Curiam*, at 10 (emphasis added). The first error in this statement is to include the separate and *special* provision contained in Art. IV, § 3, cl. 2 with the *general* enumeration of powers set forth in Art. I, § 8. The difference in composition and location of these two sections indicated a difference in purpose and intent. The Constitution in Art. IV does "[state] the particular matter of concern, *i.e.*: the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . ." It has long been recognized that *expressly* conferring this power on Congress implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

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there was no suggestion that the treaty was not law anyhow since it could not be self-executing.

HENKIN, *supra*, at 159 (in note). This section is discussing the effect of treaties as law—and not where the power to *implement* the treaty resides. In this regard, a later statement in the footnote is relevant:

Congress has often insisted that treaties modifying tariffs are not self-executing and require Congressional implementation, and the Executive has generally acquiesced. Crandall, *Treaties* 195-200 . . . In recent years tariffs have been the subject of executive agreements authorized by Congress or requiring Congressional implementation.

*Id.* At best, one could say that Henkin has made some statements, which if read out of their context, might lead to conflicting results. It is my view that his statement at 94-96, quoted above, is definitive and conclusive—the Executive may not use his foreign affairs powers to dispose of United States territory or property, since that power is specifically vested in the Congress by Article IV—and points to a position opposite to the *per curiam*.

*Wisconsin Cent. R.R. Co. v. Price County*, 133 U.S. 496, 504 (1890); *Van Brocklin v. State of Tennessee*, 117 U.S. 151, 167-168 (1886). The specific grant of power to Congress implicitly operates to deny that the power vests elsewhere. *United States v. MacCollom*, 426 U.S. 317, 321 (1976); *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 458 (1974); *T.I.M.E. v. United States*, 359 U.S. 464, 471 (1959); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

The second argument also inaccurately analyzes Art. IV. It is too narrow a view of the property disposal clause to say that it is found in Art. IV, which deals with state-federal and state-state relationships, and to conclude therefrom that the whole provision must be considered solely as distributing power between the state and federal governments rather than among the three branches of the federal government. Such argument ignores the fact that the Constitutional Convention went further and specifically designated which of the three departments was to exercise the power to dispose of United States property, to-wit: "The Congress . . ." As previously noted, the power is essentially legislative and the "Power" to exercise it was placed in the Congress, where the Constitution placed other general and specific legislative authority.

It is also significant that the Constitution in Art. IV also placed the power in "The Congress" to enact general laws to implement the full faith and credit clause and to admit new states. The designation of Congress to exercise these powers cannot be blandly dismissed as though the Constitution also left these *powers* in the air so that the President could exercise them if he so desired. Would anyone suggest that the President by treaty can admit new states?

The location of Art. IV, § 3, as indicated by prior discussion, was principally a function of the Framers' con-

cern with the claims of particular states to territory granted in their original charters. This was inextricably related to state-state and federal-state relations but it also directly involved the separation of powers between the Congress and the President; and insofar as United States versus States' "claims" were concerned, the Judiciary were also very much involved. This great concern with disposition of territory and the claims thereto caused Section 3 to be placed in Article IV, but the language of the clause—which also addresses *property*, which did not figure as importantly in the Framers' expressed concern relative to the grants under Royal charters, should not be narrowed as a result of its mere placement. The language of the clause is unequivocal: "The Congress *shall* have Power to dispose of . . . Property belonging to the United States."

This indicates that *exclusivity* of the powers in Art. IV, § 3, cl. 2, is vested in the *Congress* because if the President and the Senate, in the absence of any specific grant to that effect, were construed to possess the power, the Congress would thereby be excluded in many instances from exercising the power and the mandatory (*shall*) grant of the power to the Congress would be negated. It is recognized that some of the powers vested in Congress by Art. I, § 8 have been the subjects of treaties and that the mandatory character of that section may thereby have been obviated to some extent. That section, however, contains a great many designated powers covering a wide spectrum of legislative activity and it is recognizable that treaties might properly involve the same subjects *in a non-legislative manner*.

Art. IV, § 3, cl. 2, however, is very specific and limited. It refers only to territory and property (the claims also refer to territory and property). Thus, the specific nature and limited scope of the paragraph are reasons why the ratification procedure thus required should not be taken from Congress and obviated by self-executing treaties.

Such construction is also supported by the historical fact that the recognized intent of the Convention in this paragraph was to restrict the power to dispose of territory or property and this was the only place such intent is addressed. Had the convention intended to authorize the disposition of property as an incident of the treaty power, it would have been very easy to do so by merely inserting before the semi-colon in Art. IV, § 3, cl. 2: "(which may also be disposed of by treaty)." The fact that the disposition of *territory* clause was followed by a separate restriction of general import to the entire Constitution which critically implicated state-state and federal-state relations—while also implicating the distribution of powers among the three branches—should not cause the separate grant of broad power to dispose of territory and property to be construed narrowly.

The contention that the *placement* of the power with respect to property and territory in Art. IV is an indication of a limiting effect overlooks some other significant features of the content of the paragraph and its location. Art. IV is the first Article after the three first Articles which provided for the distribution of the powers of government between the Congress, the President, and the Judiciary. Art. IV is also the *last Article* in the Constitution that can be said to deal with the allocation of governmental powers: the remaining Articles provide for the manner of amendment (Art. V); recognize prior debts, provide for the supremacy of federal law and the oath of office (Art. VI); and provide for the manner of ratifying the Constitution (Art. VII). The Articles after IV are thus largely procedural and declaratory, and the Articles before IV are each *confined* to a separate department of government. Thus, Art. IV was the appropriate place, *after* those sections in Art. IV which place certain limitations on the states, and before the *broad* guarantee by the whole "*United States*" of a Republican form of Government, for the Convention to make provision with



respect to "Territory [and] other Property belonging to the United States" and further to add the very broad assurance applicable to all departments, the United States, and the States that "*nothing in this Constitution*" shall prejudice any claims of the United States or the states. *This is so because the Convention intended to restrict all three departments in some respect* and it would be contrary to the arrangement of the Articles to place such restriction in any of the first three Articles that were each devoted to a single department. Article IV, § 3 was the obvious place to insert its present contents and by such placement its obvious meaning was not restricted.

Art. IV covers four areas: (1) the disposition and regulation of United States territory; (2) the disposition and regulation of United States property; (3) claims of the United States; and (4) claims of any particular state. Actually these are all closely related. With respect to these areas of concern, the Convention provided that Congress should exercise the power to dispose and regulate territory and property, and then restricted the power so conferred by providing, in effect, that none of the powers conferred on the Congress, the President, or the Courts ("*nothing in this Constitution*") shall be construed to prejudice "any claims of the United States or of any particular State."

The claims so referred to were claims to "territory" in the West under Royal Charters which during the Convention were among the greatest concerns of some of the states. It is thus apparent that the most propitious place to restrict the power of the Congress, the President, and the Courts from dealing with this matter, was after the first three Articles and following the provision concerning Congress' power to dispose and regulate territory and property. It would not have been appropriate to place the restrictive language of Art. IV, § 3, cl. 2, in any of the first three Articles, as that would have suggested that the limiting language of the clause had some special

relation to one particular branch of the federal government rather than to all three branches. Placing the provision *after* those Articles, and after the territory and property provision, gives the limitation greater force and clarity.<sup>16</sup> Therefore, the location of the territory and property clause in Art. IV does not in any way limit the effect of its plain language to confer those powers on Congress as it prescribes. Furthermore, coupling the regulatory and disposition powers over "Territory [and] other Property belonging to the United States," because the regulatory power is so completely legislative, is indicative of an intent to refer to the disposition power also in its legislative context.

### III. ESTABLISHED STATE DEPARTMENT PROCEDURES FOR INTERNATIONAL AGREEMENTS

In bypassing the House of Representatives, the pending agreement does not conform to established procedures of the Department of State. These have been codified, set forth, and designated as the "Circular 175 Procedure." Department of State, 11 Foreign Affairs Manual § 700 *et seq.* (Oct. 25, 1974).

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<sup>16</sup> The rules applicable to the construction of a statute also apply to the construction of a Constitution. *Badger v. Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937) (construing Minnesota Constitution); *Davis v. Synhorst*, 225 F. Supp. 689, 691 (S.D. Iowa 1964) (construing Iowa Constitution: "Rules applicable to statutory construction are similar to constitutional construction"). "The established rule is that *if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control.*" *Lodge 1858, American Federation of Government Employees v. Webb*, No. 76-1821, slip op. at 30 (D.C. Cir. March 20, 1978) (emphasis added), and cases cited at *id.*, slip op. at 30-32, n. 31. Here, the fact that Art. IV, § 3, cl. 2 was placed *after* Articles I, II, and III is entitled to some weight in construing the intendment of Art. IV; it points to the conclusion that the language of the property disposition clause is not concerned simply with state-state and state-federal relations.

In its Circular 175 Procedure, the Department of State recognizes four types of International Agreements: Treaties which may be ratified by the Senate where to do so would not "*contravene the United States Constitution . . .*" (*Id.*, § 721.2(a), emphasis added). The Procedure also recognizes three types of agreements *other than* treaties:

(1) *Agreements Pursuant to Treaty*

The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, *whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress;*

(2) *Agreements Pursuant to Legislation*

The President may conclude an international agreement on the basis of existing legislation or *subject to legislation to be enacted by the Congress;* and

(3) *Agreements Pursuant to the Constitutional Authority of the President*

The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress *in the exercise of its constitutional authority.*

Department of State, 11 Foreign Affairs Manual § 721.2 (a) (Oct. 25, 1974) (emphasis added).

The Circular 175 Procedure also provides in the "Considerations for Selecting Among Constitutionally Authorized Procedures" for international agreements that consideration shall be given to:

c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

d. Past U.S. practice as to similar agreements.

(*Id.*, § 721.3). Following these guidelines established by the Department of State, it is obvious that those portions of the treaty providing for the transfer of property to Panama are in effect outside the treaty power. This follows because the United States Constitution requires the additional approval of the House of Representatives, or the reference to the necessity for the enactment of subsequent legislation by Congress, because Art. IV, § 3, cl. 2 provides that "The *Congress* shall have Power to dispose of . . . Property belonging to the United States . . ." (emphasis added). No party to this case questions that the treaty in its present form seeks to dispose of property belonging to the United States without approval by Congress.<sup>17</sup> This is true both as to the right to act as sovereign in the territory and as to our actual ownership of soil and fixtures which constitute property. The instant Panama Canal Treaty, insofar as it purports to dispose of the Canal territory and property,

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<sup>17</sup> Indeed, it is beyond serious dispute that if the treaty becomes effective, the United States will dispose of property. Art. XIII of the Treaty provides: "The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon . . ." We may take judicial notice of the public dispute as to the nature of the interest this country presently possesses in the territory of the Canal Zone from its treaty right to act in perpetuity as though sovereign—whether it be a fee interest or a leasehold. In any event, the interest is a "property interest." Irrespective of the nature of this interest, this nation is definitely transferring a property interest in the fixtures and other improvements made on the real property. This includes the entire Panama Railroad, which the United States purchased as authorized by Congress (32 Stat. 481) and all the other real property that the United States purchased from the individual owners of the land, including the property and other interests of the French Canal Company for which the U.S. paid \$40 million. (See 32 Stat. 481). All of this is property within the meaning of Art. IV. A substantial payment was also made to Columbia.



thus includes provisions of the second type, section 721.2 (a)2, *supra*, which the State Department procedure correctly interprets the Constitution to provide that:

The President may conclude . . . subject to legislation to be enacted by the Congress . . .

Thus, the property disposition portion of the treaty under the Constitution constitutes a severable international agreement that cannot constitutionally come into force unless the entire "Congress" approves that transfer.

Obviously Congress may not be required to approve other parts of the treaty. It should also be recognized that attempting to bypass the House of Representatives with the scheme which is framed as a "self-executing treaty" ignores that part of the Department of State Procedure which states that "[p]ast U.S. practice as to similar agreements" shall be followed. *Id.*, § 721.3d. And, lest the *Per Curiam* opinion insist that its attempt to distinguish "executive agreements" was successful and authorizes the treaty procedure presently being followed, the "past practices" in Panama were in complete accordance with the views expressed in this opinion. See Part IV, *infra*; but cf. *Per Curiam* op., n.24.

#### IV. PAST U.S. PRACTICES INVOLVING SIMILAR AGREEMENTS WITH PANAMA

##### A. *Prior Panamanian Treaties*

The procedure to be used in conveying United States property to Panama confronted President Eisenhower in 1955 in the Eisenhower-Remon Treaty with the Republic of Panama which, *inter alia*, disposed of some "property of the United States" in Colon and Panama City. That Eisenhower-Remon Treaty provided in Art. V:

The United States of America agrees that, *subject to the enactment of legislation by the Congress*,

there shall be conveyed to the Republic of Panama free of cost all the right, title and interest held by the United States of America or its agencies in and to certain lands and improvements in territory under the jurisdiction of the Republic of Panama [etc.] . . . The lands and improvements referred to in the preceding sentence and the determinations by the United States of America respecting the same, *subject to the enactment of legislation by the Congress*, are designated and set forth in Item 2 of the Memorandum of Understandings Reached which bears the same date as this Treaty. The United States of America also agrees that, *subject to the enactment of legislation by the Congress*, there shall be conveyed to the Republic of Panama free of cost all its right, title and interest to the land and improvements in the area known as PAITILLA POINT and that effective with such conveyance the United States of America shall relinquish all the rights, power and authority granted to it in such area under the Convention signed November 18, 1903.

Treaty of Mutual Understanding and Cooperation Between the United States of America and the Republic of Panama, 6 U.S.T. 2274, 2278-79 (Jan. 25, 1955) (emphasis added).

Thereafter, Congress enacted Public Law 85-223, 71 Stat. 509 (1957), which authorized such disposition.<sup>18</sup> This is the most substantial example of United

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<sup>18</sup> Public Law 85-223 of August 30, 1957 provided:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

TITLE I—CONVEYANCE OF PROPERTY TO THE REPUBLIC OF PANAMA AND FISCAL ADJUSTMENTS BY PANAMA CANAL COMPANY

SEC. 101. It is hereby declared to be the purpose of this title—

States past practices that exists. It also transferred land to Panama. The treaty itself called for *congressional* enactment. In my opinion, that same procedure is required

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(1) to authorize and direct the fulfillment of those provisions of the Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama signed on January 25, 1955, and of the memorandum of understandings reached signed on the same date, which contemplate, subject to authorization by the Congress, the conveyance of various lands and improvements to the Republic of Panama, including, but not limited to, conveyance of the lands and improvements in, and simultaneous relinquishment of all right, power and authority in, the area known as Paitilla Point, and including the removal of the railway terminal operations of the Panama Canal Company from the city of Panama and the conveyance of the lands and improvements known as Panama Railroad Yard in the city of Panama; and

(2) to authorize and provide for the adjustments in the fiscal obligations of the Panama Canal Company necessitated by the aforesaid conveyances.

SEC. 102. (a) In accordance with and subject to the provisions of article V of the Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama signed on January 25, 1955, and item 2 of the memorandum of understandings reached signed on same date—

(1) the Secretary of State is authorized and directed to convey to the Republic of Panama free of cost all the right, title, and interest held by the United States of America or its agencies in and to the land and improvements in the area known as Paitilla Point and in the areas designated in paragraphs 1, 2, and 3 of paragraph (a) of said item 2; and

(2) the Panama Canal Company is authorized and directed to remove its operations and withdraw from the other lands and improvements designated in said item 2, and to convey to the Republic of Panama free

here by the property disposition provision of the Constitution and by the Department of State's Circular 175 Procedure.

The Committee Report asserts that Articles VI and VII of the Eisenhower-Romon Treaty of 1955 is an example of a self-executing treaty which authorizes the transfer of territory or property belonging the United States to other nations without a "*prior* Congressional act authoriz-

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of cost all the right, title, and interest held by the Panama Canal Company and the United States of America in and to said other lands and improvements.

(b) The market value of the property of the Panama Canal Company conveyed under this directive or by operation of articles VI or VII of the treaty and the net capital loss, if any, as established by the Panama Canal Company and approved by the Director of the Bureau of the Budget, sustained in the disposal, relocation, or realization of any facility or other property of the Panama Canal Company rendered excess, wholly or in part, by operation of articles V or XII of the treaty or items 2, 6, 9, or 10 of the memorandum of understandings reached shall be treated as extraordinary expenditures and losses incurred through directives based on national policy and not related to the operations of the corporation, within the meaning of section 246(d) of title 2 of the Canal Zone Code, as added by the Act of June 29, 1948 (ch. 706, 62 Stat. 1075). The market value of Canal Zone Government property conveyed under this directive shall be removed from the capital investment of the United States in the Canal Zone Government without charge to the costs of operation of that agency. There are hereby authorized to be appropriated such amounts as may be required for the necessary replacement of property or facilities of the Panama Canal Company or Canal Zone Government conveyed or rendered excess as the result of the treaty or memorandum, such amounts to be charged to the Panama Canal Company or the Canal Zone Government, respectively.

Approved August 30, 1957. (71 Stat. 509)



ing such transfer." Committee Report at 68, 69 (emphasis added). Close examination does not support that conclusion. Naturally, enactment of an act *prior* to the treaty is not necessary—but the Committee Report suggests that an act prior to the *transfer* is not necessary; and the intent of the Committee Report, the Attorney General's Opinion, and the wording of the present Treaty provide for the transfer of the property the instant the instruments of ratification are exchanged, thereby completely eliminating the House of Representatives from any constitutional role in the transfer of United States property. Art. V of the 1955 treaty belies the Senate's and appellee's position. And the two provisions in Articles VI and VII only related to minor boundary matters. Art. VI<sup>19</sup> concerned the modification of a boundary line between the City of Colon and the Canal Zone; this article replaced Art. V of the Boundary Convention of September 2, 1914<sup>20</sup> and modified Art. VIII of the Hull-Alfaro Treaty, which had been signed on March 2, 1936.<sup>21</sup> Art. VII concerned a boundary modification near Manzanillo Island.<sup>22</sup>

The asserted "self-executing" nature of Articles VI and VII of the 1955 treaty therefore do not provide precedential authority for disposing of the Panama Canal property without congressional approval. First, rectification of boundaries is a distinct matter from the disposition of the staggering amount of property in question here.<sup>23</sup>

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<sup>19</sup> 6 U.S.T. at 2279-85.

<sup>20</sup> 38 Stat. 1900.

<sup>21</sup> The treaty is reprinted at 84 CONG. REC. 9825-33 (1939).

<sup>22</sup> 6 U.S.T. at 2285.

<sup>23</sup> The *per curiam* opinion at notes 22-23 and the accompanying text addresses the boundary rectification point, and concludes that whether there is a dispute about the property or territory has nothing to do with whether the President can

Boundary rectification ordinarily involves a dispute about which country owns the property; the subsequent agreement is more like a disposition of *claims* than of prop-

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dispose of the same. This, in my opinion, is not correct: (1) the prior practices in this *unique area* are relevant, as the Circular 175 Procedure provides; (2) a bona fide boundary dispute is clearly not the same thing as disposing of our undisputed property in the Panama Canal. The point that the Western lands were the subject of conflicting claims, which causes the majority to conclude that status has no bearing on whether congressional enactment is required to convey land, is not analogous: it is not so much the status of the land itself that is crucial but the nature of the dispute and its relation to that status—that is, in all prior boundary settlements which appellee contends involved a cession, the dispute concerned claims of the grantor and grantee, and the settlement was of those claims. A dispute between two states, or between two private individuals, over a tract does not, by itself, give the land a peculiar status that removes it from the Art. IV requirement; thus, land that is subject to competing claims of two states of the United States would still require an act of Congress for conveyance to a foreign country.

Note 23 of the *per curiam* opinion asserts difficulty in understanding how the validity of using the treaty process should in any way depend upon whether the nation to whom the land is conveyed previously “claimed” the land. The explanation is not difficult but the statement of the *per curiam* opinion involves a false assumption, *i.e.*, that the property which the treaty recognizes as belonging to a prior claimant would be “conveyed” by the treaty. To so state is an inaccurate description, particularly of those treaties in the early days to which the *per curiam* opinion refers at 19 n.21, where there was considerable ignorance of the territory involved. Since, for instance, Spain claimed the western lands to the 42nd parallel, the fact of their claim, based as it was on the recognized right of discovery, some minimal exploration in the most far reaching regions and very minor settlement, when that claim is recognized in a treaty by the United States it is almost impossible to conclude in view of our negligible exploration or settlement of the fringes of the Spanish claim that the United States was actually disposing of territory or property belonging to it. What rights we did

erty, for the question of whether there even exists "United States property" is the entire matter in dispute.<sup>24</sup>

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possess in the eastern area flowed from the Louisiana Purchase from France of what had originally been territory claimed by Spain. Such situations are generally recognized as *not* being an alienation of territory but merely a recognition of the particular claim and a determination of the invalidity of the losing claim. *See* n.24. It follows, that since we admitted our claim was inferior, that the treaty in that respect did not dispose of any territory or property belonging to the United States. Here, however, the title of the United States to the property in question is recognized by all.

<sup>24</sup> Writing in 1929, Willoughby stated: "In several treaties in settlement of boundary disputes areas previously claimed by the United States as its own have been surrendered to foreign powers. These, however, can scarcely be considered as instances of the alienation of portions of its own territory, for the fact that the treaties were assented to by the United States is itself evidence that it was conceded that the claim that the areas in question belong to the United States was unfounded. *There has been no instance in which territory, indisputably belonging to the United States, has been alienated to another power.*" 1 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 572 (2d ed. 1929) (emphasis added).

Crandall writes that resolutions were introduced in the House in 1820 following the Florida treaty of 1819, which would have asserted that no treaty purporting to alienate any portion of the territory belonging to the United States could be valid without the concurrence of Congress, but no vote was taken on the matter. In the debates on the resolution, Mr. Clay, who introduced the resolution, stated that a treaty could fix the boundaries of the United States without the concurrence of Congress "when the fixation of the limits simply was the object. . . . in all these cases, the treaty-making power merely reduces to certainty that which was before unascertained. It announces the fact; it proclaims in a tangible form the existence of the boundary; it does not make a new boundary; it asserts only where the new boundary was. But it cannot under color of fixing a boundary previously existing, though not in fact marked, undertake to cede away, without the concurrence of Congress, whole provinces." He stated that if the subject was mixed, *i.e.*, partly cession and partly

Second, in comparing the amount of property allegedly disposed of by Articles VI and VII to the amount being disposed in the present treaties, it is clear that the 1955 disposition, in relative terms, was even less than *de minimus*. Third, and most significantly, *Congress did approve Articles VI and VII in its 1957 statute.*<sup>25</sup> Section 102(b) of the statute in its last line "authorized to be appropriated such amounts as may be required for the necessary replacement of property or facilities . . . conveyed or rendered excess as the result of the treaty or memorandum . . . ." Unlike Section 102(a) which only addressed the matters contained in Art. V of the treaty, section 102(b) addressed all *three* articles—V, VI and VII—and the authorization of appropriations for replacement of conveyed property constituted approval by Congress of the content of Articles VI and VII.

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fixing a boundary, the consent of Congress was necessary. Mr. Clay believed that the Florida treaty was more than a boundary determination.

Mr. Lowndes, of South Carolina, took a different position and contended there could be no adjustment of a claim to a boundary without some cession of supposed right by one or the other party. Mr. Anderson, of Kentucky, believed that the treaty power must permit boundary settlements: "Its frequent operation on the settlement of differences of this kind, must have been contemplated by the Convention; and it could never have been intended, that, in a general grant of power, it should be construed not to apply to cases, which had been invariably, in all countries, the subjects of its operation."

Boundary rectification is not an example of cession of territory. In addition to being an adjustment of claims, it is supported by *prior practices*, as Mr. Anderson points out: the prior practice of boundary rectification involves a matter different from the wholesale relinquishment of large areas of undisputed territory.

S. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 227-29 (1916).

<sup>25</sup> See note 17 *supra*, § 102(b).



However, even if Articles VI and VII did involve a disposition of property which Congress did not initially approve, it may be that those Articles were themselves unconstitutional. Even Congress' silent acquiescence in that small disposition—assuming that is what may have happened temporarily—cannot alter the proper constitutional procedures mandated under Art. IV of the United States Constitution for the transfer by the Panama Canal treaty of United States property of the staggering value here being disposed of.

It is also convincing that in 1932, in another transfer of property to Panama, the Government considered it to be necessary to obtain prior specific congressional authorization even for a *minor* disposition of property from the Canal Zone to the Republic of Panama. Public Law No. 117, 47 Stat. 145 (May 3, 1932), *authorized* the Secretary of State to effect with the Republic of Panama a modification of the boundary line.<sup>26</sup> This slight aliena-

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<sup>26</sup> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That with respect to that parcel of land in the Panama Canal Zone known as the Paitilla Point Military Reservation, title to which was acquired by the Government of the United States under the conventions concluded on November 18, 1903, and September 2, 1914, between the United States and Panama, the Secretary of State be, and he is hereby, authorized and empowered to effect with the Republic of Panama a modification of the boundary line between the Panama Canal Zone and the Republic of Panama so that such line shall then run as follows: [Property description]

SEC. 2. Nothing contained in this Act shall be construed to authorize the Secretary of State to convey or to surrender to the Government of Panama the title which the Government of the United States now holds in that parcel of land which may be detached from the Panama Canal Zone by virtue of the provisions of section 1 of this Act.

[Continued]

tion was not a boundary correction but was in fact a cession of land made necessary by the requirements of international law with respect to embassies.<sup>27</sup>

During World War II, there were discussions between Panama and the United States concerning disposition of bases and the transfer of waterworks and railroad lots. On May 18, 1942, an agreement on the lease of defense sites was made between the two countries.<sup>28</sup> A more significant agreement was reached that same day,<sup>29</sup> which, based upon an exchange of notes, provided:

*When the authority of the Congress of the United States shall have been obtained therefor, the Government of the United States will transfer to the Government of the Republic of Panama free of cost all of its rights, title and interest in the system of sewers and waterworks in the cities of Panama and Colon.*

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<sup>26</sup> [Continued]

SEC. 3. No civil or criminal case that may be pending in the courts of the Panama Canal Zone at the time this Act shall become effective shall be affected thereby, either as to its present status or as to future proceedings, including final judgment or disposition.

Approved, May 3, 1932.

<sup>27</sup> This boundary change was not a boundary dispute where there would be no cession. See note 24 *supra*. Instead, the United States wanted to build a new legation in Panama, and the chosen site was in the Zone. A legation could not be built on United States territory; hence, the property was alienated to Panama, which then retransferred the property back to the United States' jurisdiction, but with diplomatic immunity and immunity from local jurisdiction for use as a legation. 75 CONG. REC. 4652-57 (1932).

<sup>28</sup> Agreement for the Lease of Defense Sites in the Republic of Panama, 57 Stat. 1232 (May 18, 1942).

<sup>29</sup> Agreement between the United States of America and Panama respecting general relations, 59 Stat. 1289 (May 18, 1942).

59 Stat. at 1289 (emphasis added). The agreement also provided:

*The President will seek the authority of Congress of the United States to transfer to the Republic of Panama free of cost all of its rights, title and interest to the lands belonging to or of which the Panama Railroad Company now has usufruct in the cities of Panama and Colon which are not currently or prospectively needed for the maintenance, operation, sanitation and protection of the Panama Canal, or of its auxiliary works, or for the operation of the Panama Railroad.*

59 Stat. at 1290 (emphasis added). These agreements thus *recognized the constitutional necessity for Congress to approve the disposition of United States property*. On May 3, 1943, Congress enacted the legislation necessary to effectuate the transfer. Public Law No. 48, 57 Stat. 74 (May 3, 1943).<sup>30</sup> These are thus *not* examples of self-executing transfers by treaty.

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<sup>30</sup> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and is hereby, authorized to transfer to the Republic of Panama all of the right, title, and interest of the United States in and to water and sewerage systems installed by the United States in the cities of Panama and Colon: Provided, however, That pending the establishment of an independent water-supply system, and so long as the Republic of Panama desires to utilize a supply of water from the Canal Zone, it shall pay quarterly to the appropriate Canal Zone authorities the rate of B/0.09 per one thousand gallons or such other reasonable rate as may be agreed upon by both Governments: And provided further, That the turning over to the Government of the Republic of Panama of the physical properties of the water and sewerage systems and the administration thereof, including the collection of the water rates, does not in any way modify the existing arrangement in respect to responsibility for the public health services of the cities of Panama*

Appellee also cites the "Convention of May 24, 1950 [with the Republic of Panama] for Change in the Boundary and the Grant of Certain Corridors, 6 U.S.T. 462,"

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and Colon as specified in the second paragraph of article VII of the Convention between the United States of America and Panama, signed at Washington, November 18, 1903.

SEC. 2. The Panama Railroad Company is hereby authorized to convey to the Republic of Panama, in whole or in part, all of its right, title, and interest in and to so much of the lands of the Panama Railroad Company located in the cities of Panama and Colon as, in the opinion of the Secretary of War, are no longer needed for the operation of the Panama Railroad or for the operation, maintenance, sanitation, or defense of the Panama Canal: *Provided*, That any such instruments of conveyance shall contain a provision under which the Panama Railroad Company and any of its successors in interest agrees to fully protect the Government of the United States against any claims for damages or losses heretofore or hereafter incurred by any lessee of any of the lands covered by such conveyance. The authority conferred by this section shall not be exercised after June 30, 1944.

(a) Any conveyance of any land in pursuance of the authority contained herein shall be deemed to release any and all reversionary rights of the United States in said property.

(b) The provisions of the joint resolution entitled "Joint resolution authorizing the disposal of certain lands held by the Panama Railroad Company on Manzanillo Island, Republic of Panama," approved July 10, 1937, so far as they may conflict with the provisions of this joint resolution, are hereby modified accordingly.

SEC. 3. There is hereby authorized to be appropriated out of any moneys in the Treasury, not otherwise appropriated, a sum not to exceed \$2,700,000, to enable the Secretary of the Treasury to pay to the Republic of Panama an amount equivalent to the principal and interest paid by that government on account of the credit of \$2,500,000 made available to it by the Export-Import Bank for the construction of Panama's share of the



Appellee's Supplemental Memorandum, March 17, 1978, at 3, as an example of a treaty which demonstrates "that under well established historical practice treaties with foreign countries have ceded rights to property of the United States," *id.*, at 4. Reference is also made to Art. VI in the 1955 treaty with respect to "a small portion of the Colon and of the Colon corridor." *Id.*, at 4.

The Convention of August 9, 1950 is entitled "Colon Corridor and Certain Other Corridors Through the Canal Zone." 6 U.S.T. 461. In Art. II thereof *the Republic of Panama transferred* certain tracts of land from the city of Colon to the Canal Zone as a boundary change and provided that said property would be incorporated "to form part of the canal Zone in the same manner as though [said lands] had been included within the grants contained in the [boundary] convention of November 18, 1903 . . ." 6 U.S.T. 465.

Thereafter in Art. III the United States transferred to the Republic of Panama "*jurisdiction* over the corridor" (emphasis added). This included the Colon corridor and another corridor through a small portion of the Canal Zone. The purpose of these transfers was so that "the city of Colon may enjoy direct means of land communication under Panamanian jurisdiction with other territory under jurisdiction of the Republic of Panama . . ." 6 U.S.T. 465. This was something less than a transfer of "territory or property" because Art. V of the convention provided that the provisions previously referred to [confering *jurisdiction* over corridors] "shall not affect the rights and obligations of either of the two high contracting parties under the treaties or other international agree-

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Chorrera-Rio Hato Highway, and to pay to the Export-Import Bank an amount sufficient to liquidate the remaining obligation of the Republic of Panama to that bank on account of the aforesaid credit.

Approved May 3, 1943.

ments now in force between the two countries, nor be considered as a limitation, definition, restriction or restrictive interpretation of such rights and obligations . . .” 6 U.S.T. 469.

The reference to prior “treaties or other international agreements now in force between the two countries . . .” included reference to the treaty of November 18, 1903 which provides that the grants to the United States by the Republic of Panama should not “interfere with the rights of way over the public roads passing through the said Zone . . . unless said rights of way . . . shall conflict with rights . . . granted to the United States.” Art. VI, 33 Stat. 2235. Thus, there being no conflict with United States’ rights, the convention of 1950 insofar as it related to highway corridors was dealing with a subject in which the Republic of Panama had *reserved* certain rights from the earliest treaty. Therefore, the recognition of Panama’s “*jurisdiction*” over a highway corridor, which the agreement provided the United States had a right to use, and which did not take any land out of the Canal Zone proper, is not an instance where property owned by the United States was disposed of. *From the inception of the 1903 treaty, the United States had never possessed the right to “interfere with the rights of way over public roads passing through said Zone” (Art. VI).* The necessity for appellee to attempt to rely upon such unsupporting authority is an indication of the great weakness of his position.

The present case boils down to this: President Eisenhower in 1955 recognized his constitutional obligation to obtain authority from Congress to transfer a *depot* of the Panama Railroad to the Republic of Panama; but the appellee presently contends he does not need congressional approval to transfer the *entire Panama Railroad* and very substantial amounts of other property to the same party, and to reduce the entire interest of the United States in

the colossal Panama Canal to a 21-year partnership with Panama solely in its operation.

With respect to prior treaties and agreements between the United States and Panama, the "past U.S. practice," as demonstrated above, has recognized the necessity of approval by *Congress* and has sought such approval by legislation whenever *United States territory or property was conveyed to Panama*. Heretofore *every* transfer of United States' property to Panama has been authorized in advance or subsequently ratified by action of *Congress*.<sup>31</sup> The proposed agreement flies in the face of all these "past U.S. practices" and this violates established procedures of the State Department.

*B. Senate Debate in 1943 over Transfer of United States Property to Panama.*

The Joint Resolution of 1943 which transferred the waterworks and some of the property of the Panama Railroad to Panama (57 Stat. 74) was the subject of debate in the Senate in which some Senators expressed the opinion that the disposition should have been made by Treaty, and not by resolution of both Houses (*see* 88 CONG. REC. 9320 *et seq.*). The scope of Art. IV was discussed at considerable length. Senator Hiram Johnson of California argued that the resolution was dealing with "property of the United States" and that the Senate should "perform its constitutional function" by disposing of it by treaty. However, his views did not prevail against those pointing to the specific character of the language in Art. IV, § 3, cl. 2.

On December 3, 1942, Senator Connally of Texas, Chairman of the Senate Foreign Relations Committee, discussed the pending Senate Joint Resolution 162, which

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<sup>31</sup> Appellee's claims with respect to the minor matters referred to in Articles VI and VII of the 1955 Eisenhower-Remon Treaty are answered at 39-43, *supra*.

was to similar effect as the House Joint Resolution which eventually authorized the transfer. He quickly addressed the sentiment that a treaty should be the implementation instead of a Joint Resolution by the Congress:

Mr. President, I am and have been and in the future shall continue to be ardent in my maintenance of the integrity and the rights of the Senate of the United States in all its proper functions as a branch of the Government; but the matter covered by the joint resolution has to be passed by the Congress sooner or later in some form, for the simple reason that under the Constitution of the United States, Congress alone can vest title to property which belongs to the United States. The Constitution itself confers on Congress specific authority to transfer territory or lands belonging to the United States. *So, if we had a formal treaty before us and if it should be ratified, it still would be necessary for the Congress to pass an act vesting in the Republic of Panama the title to the particular tracts of land; because "the Congress" means both bodies.*

The House of Representatives has a right to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise.

88 CONG. REC. 9267 (Dec. 3, 1942) (emphasis added). Senator Vandenberg of Michigan then intervened to inquire why the disposition of the waterworks and some property owned by the Panama Railroad could not be by executive agreement. They became somewhat sidetracked, whereupon Senator O'Mahoney of Wyoming queried why the disposition should not be by treaty? In the course of responding, Senator Connally stated:

Mr. President, I referred earlier in my remarks to the constitutional requirement that Congress shall exercise consent in the case of the disposal of real estate. Article IV, section 3, of the Constitution, among other things, provides:



The Congress shall have authority to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

*So that, in any event, it would be necessary to have congressional action even though there were a treaty. In this case it would be necessary to have congressional action parting with title to these properties.*

88 CONG. REC. 9269 (Dec. 3, 1942) (emphasis added). In response to a query from Senator Taft of Ohio, Senator Connally made the point that a treaty could be substituted for the joint resolution *if* there was subsequent enacting legislation:

Mr. TAFT. I am somewhat hazy on the subject of why an executive agreement should be confirmed by legislation instead of being made the subject of a treaty. I myself have had considerable difficulty in drawing the line. It does not seem to me that the mere fact that some legislation is necessary to implement this particular agreement necessarily excuses it from being made the subject of a treaty.

Mr. CONNALLY. As a legal proposition I think the Senator from Ohio is correct. The mere fact that legislation is required does not necessarily mean that we could not first, by means of a treaty, assume the obligations, *and then carry out the obligations by the enactment of legislation.* I will say very frankly to the Senator from Ohio—I do not think he was present awhile ago when we discussed that question—that the Senator from Texas is not prepared with the accuracy of a civil engineer to draw the boundary line between what can be done by executive agreement and what can be done by a treaty.

88 CONG. REC. 9270 (Dec. 3, 1942). (Emphasis added).

The next day, Senator Johnson of California spoke against the resolution, as described above. Senator Tunnell responded:

There are different methods, apparently, by which questions of international moment are met. This is not a new question. Sometimes those who have objected to the course of the Executive have been more fortunate than those who are now making this objection. In this instance the Constitution specifically provides for this method. In article IV, section 3, second paragraph, I find this language:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.

It seems to me that if any other method than that of transfer by Congress had been attempted, we should have been met by the objection that Congress was the only power by which this territory or this property could be disposed of. *There is no other method or authority to dispose of property of the Nation than that which is reposed in the Congress.*

88 CONG. REC. 9322 (Dec. 4, 1942) (emphasis added). The Joint Resolution passed 40 to 29. 88 CONG. REC. 9320 (Dec. 4, 1942).

It cannot be said from this that the procedure there adopted by the President and *the Congress* to transfer property to Panama has the same effect as a binding judicial precedent. It must be recognized, however, that the Senate did understand the nature and importance of the issue and its constitutional—and political—ramifications; and in an instance where United States property of much less value than is here involved was being transferred, the Senate did decide that the proper procedure called for legislative action of the *Congress*. In our review of past practices, it is also important that this was another case involving the transfer of land to Panama.

V. THE HISTORY OF THE TREATY CLAUSE IN THE CONSTITUTIONAL CONVENTION AND ITS RELATION TO THE DISPOSITION OF PROPERTY BELONGING TO THE UNITED STATES

Appellee contends that the Constitutional Convention

adopted a proposal that required two-thirds of the Senate to concur in all treaties, *including peace treaties involving cessions of territory*. 2 FARRAND, *supra*, at 544, 549 . . . [which] demonstrate[s] that the framers of the Constitution contemplated the transfer of United States territory and property by treaty.

Appellee Br. at 11 (emphasis added). No such proposal was finally adopted. On September 4, 1787 the working draft of the proposed Constitution provided:

Sect. 4. The President by and with the advice and consent of the Senate, shall have power to make treaties . . . But no Treaty shall be made without the consent of two-thirds of the Members present.

2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 495 (rev. ed. 1929) (hereafter "FARRAND").

On September 7, the words "(except Treaties of Peace)" were added after the word "Treaty."<sup>32</sup> 2 FARRAND, 533. Under this amendment, a *majority* vote of the Senate could have ratified a *peace treaty*. Thereupon a motion was made to add the following amendment:

But no Treaty of Peace shall be entered into, whereby the United States shall be deprived of any of their present Territory or rights without the concurrence of two-thirds of the members of the Senate present.

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<sup>32</sup> 2 FARRAND 533 states: "which passed in the affirmative." See also, *id.*, 541.

2 FARRAND, 534. This amendment was *defeated* by adjournment, 2 FARRAND 534, 543, and was never offered again.

The very next day, as the first order of business, the convention *struck* the previously adopted amendment, *i.e.*, "(except Treaties of Peace)" from then section 4 by a vote of eight states to three. 2 FARRAND 544, 548-549. Thus, even that clause never became part of the treaty provision.

Thus, the convention eventually rejected the proposal that peace treaties should be ratified by a majority vote of the Senate, and by adjourning, it also rejected the proposal to add a specific provision that treaties of peace *transferring United States Territory or rights* would require a two-thirds vote if other peace treaties could be ratified by majority vote. Appellee's brief and argument overlook these facts.

The mere offering, consideration, and rejection of the amendment as to United States "territory and rights" does not support appellee's claim "that the framers of the Constitution contemplated *the transfer of United States territory and property by treaty*." <sup>33</sup> Appellee Br. at 11 (emphasis added). Had the amendment with respect to the "territory and rights" become part of the treaty clause of the Constitution, appellee's interpretation would have been correct, but that amendment, contrary to appellee's representation, never even reached the voting

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<sup>33</sup> None of the debates or amendments at the convention referred to United States "property." The concern of the delegates was with territorial and other rights, such as navigational rights on rivers and offshore fishing rights and the rights of sovereignty over such land and areas. Property rights, such as the United States owns in the physical property of the Panama Railroad and the Panama Canal which were purchased or constructed on land that was purchased, were not debated in the convention. The clarity of the reference to "property" eliminated need for debate.



stage. 2 FARRAND, 534, 543. Thus, the convention proceedings with respect to that amendment do not support appellee's present contention, and the temporary inclusion of peace treaties does not support an interpretation that the naked treaty power which was eventually voted included the right to cede territory. Even if a "Peace Treaty" could, they are a peculiar breed with their own characteristics, and insofar as they cede property they are usually recognizing that the property has already passed from their domain. The conclusive answer to that argument, however, is that we are not here concerned with a "Peace Treaty."

Doubtlessly, the two members who offered the amendment with respect to "territory and rights" were of the view that treaties could transfer territory and rights of the United States (to be) and of the particular states; but these amendments were defeated and there is no indication that the movers (Williamson and Spaight, 2 FARRAND 543) took cognizance of the provision of the present Art. IV, § 3, cl. 2, which at that time was in its present form, except for its reference to "Legislature" which was later changed to "Congress" (2 FARRAND 459, 466).

In this matter, however, we should be guided more by the *action* of the Convention as a whole and by the interpretation evident from *rejection* of the proposed amendment by a substantial majority of states. In this inquiry there is nothing in the convention proceedings to refute the conclusion that the majority rejected the amendment because it interpreted the then-existing broader language that became Art. IV, § 3, cl. 2 as providing better protection for their interests through *Congress* than would have been possible through the defeated addendum to the treaty clause. In believing they had guaranteed that no territory or property belonging to the United States could be disposed of except by *the Congress* the Framers of the Constitution were concerned lest the President and 10 Senators (two-thirds of a bare quorum), possibly from

only 5 states, would be empowered to dispose of United States territory and property. This was a real concern because the Senators under the Constitution were to be "chosen by the [state] Legislature" and were to be representatives of the states, whereas the "House of Representatives [was] . . . chosen . . . by the People," and was considered to be their direct representatives—much like the House of Commons in England. In those days transportation from the outlying states of the newly formed nation was also slow, uncertain and difficult and there was always the possibility that the Senate might be meeting with short quorums. Hence the Framers were concerned that the assured broader representation of the House should be reflected whenever the President sought to dispose of Government territory or property particularly to foreign powers. The House of Representatives was also apportioned equally throughout the United States on the basis of population. Despite the Seventeenth Amendment providing for direct election of Senators, they are still elected from states without any apportionment based on population and the language of Art. IV, § 3, cl. 2, has not been changed or altered in any respect. Therefore, the territorial and property disposition provision retains the same intent as when it was originally composed by Gouverneur Morris and adopted by the Constitutional Convention—11 states to 1.

Any member who relied on what became the property disposition clause of Art. IV would have voted for adjournment on September 7 against the territorial amendment discussed above, and would have had no reluctance to vote for the Constitution in the form in which it was submitted with Art. IV, § 3, cl. 2 as at present.<sup>34</sup>

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<sup>34</sup> In other words, appellee's argument reasons as follows: At the outset, the draft of section 4 under consideration said that a treaty required for approval a two-thirds vote of the Senate. A majority thought that peace treaties were good, and therefore adopted an amendment excepting peace treaties

The majority also refers to the history of the state ratifying conventions, and concludes therefrom that the states—in addition to the Framers—were satisfied that a two-thirds requirement in the Senate, rather than full congressional approval, served as an adequate check on the alienation of United States territory.

Such a broad conclusion cannot be drawn from the history of the state conventions. Typical of the majority's position is reliance on a proposed amendment at the Virginia ratifying convention, which read in full as follows:

[N]o commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the

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from the two-thirds requirement (and thereby requiring only a majority). But at least two of the Framers thought that this authorized the transfer of territory with only a majority vote, and therefore sought to except peace treaties that transferred territory from the peace treaty exception (which would require a two-thirds vote to transfer property). Eventually all amendments were defeated, and a two-thirds vote was required for all treaties. Appellee reasons that since the two Framers above "got their way," the Convention believed that territory could be transferred by treaty without an Act of Congress. This does not necessarily follow, as the text demonstrates. It may have been that when the two Framers proposed their amendment, a substantial number of the convention realized that the amendment could well pass, and that that would create a conflict—or perhaps erase—the action taken earlier, namely Art. IV, sec. 3, cl. 2, which allowed only Congress to dispose of property and territory. Faced with this prospect, a majority might have decided to abandon the peace treaty exception altogether, so as to preserve the language in Art. IV without compromise. Their reconsideration of the peace treaty exception, and its eventual rejection, is consistent with this interpretation.

American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.

3 ELLIOT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 660 (1907). Irrespective of the statements of the participants of the Virginia convention, who may well have been laboring under the mistaken pretense that Art. VI was not operative in this area or who may not have even thought about that section at all, a wholly permissible conclusion to be drawn from the *rejection* of this amendment was that the provision in Art. IV for a vote of the *full Congress* for disposition of territory or property was an adequate safeguard. The statements of parties who suggested such amendments, in their honest but mistaken fear that the treaty power alone allowed the disposition of territory or property in circumstances such as are here present, and then had their amendment defeated, do not constitute an authoritative interpretation of the scope of Art. II.

## VI. ELEVEN PRIOR TREATIES

Appellee's brief and the Committee Report<sup>35</sup> both refer to eleven treaties supplied by the Department of State and argue that such treaties were couched in self-executing terms and constitute examples of the transfer of United States territory or property to other nations, and in some instances to individuals, *without a prior congressional act authorizing such transfer*. It is further asserted that these instances support the contention that Art. IV, § 3, cl. 2 of the Constitution permits the President through a treaty to dispose of property belonging to the United

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<sup>35</sup> Committee Report, at 68.



States without approval of "the Congress."<sup>36</sup> We examine each of these treaties for verification of the asserted interpretation; and we find little or no support therefor.

#### A. *Indian Treaties*

1. *The Treaty with the Cherokee Nation of December 29, 1835* (78 Stat. 478).—This treaty was preceded by the Act of May 28, 1830, by which Congress authorized the exchange of western lands for the Cherokee's eastern lands in connection with their removal to lands west of the Mississippi River. However, the 1835 treaty, in some respects, exceeded the statutory authorization as to the lands that were to be transferred, and citizens who took title to some lands subsequently transferred from the Indians were subjected to attacks upon their title. *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), involved such a controversy. The Court held, in effect, that those who received land from the Indians acquired good title because Congress, by appropriating some four-and-one-half million dollars to carry out the treaty, had in effect ratified the *ultra vires* acts of the treaty negotiators. In so ruling, the Court's opinion recognized the issue as to whether a treaty could convey lands belonging to the United States, but then stated:

It is not necessary to decide the question in this case, [whether the treaty conveyed title without Congressional approval] as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid.

84 U.S. (17 Wall.) at 247.<sup>37</sup> Thus, far from holding that

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<sup>36</sup> *Id.*

<sup>37</sup> At 17 U.S. 247, the Court stated:

[T]here are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Con-

a treaty can transfer property belonging to the United States without Congress, the case recognizes the requirement of congressional authorization and holds that when

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gress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.

The cases cited in the footnote to this statement do not support the argument that the President by Treaty is empowered to transfer the Panama Canal and Railroad. The cases cited are:

1. *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867). This case is only authoritative on part of the *Holden* statement, and has no significance for the transfer of the Panama Canal and Railroad. A treaty between the United States and the Choctaw Indian Tribe entitled each Choctaw head of family to a section of land. The treaty was signed in 1830; in 1834, Wall, a Choctaw, entered into an agreement with Wilson to transfer the land to him as soon as he obtained it. He made the transfer in 1836, and was paid \$750. Wall's children then sued Wilson for the land, alleging a constructive trust in their favor. Wilson claimed a bona fide purchaser defense. The Alabama Supreme Court held for plaintiffs, and the Supreme Court reversed.

Congress became involved in 1841; complaints concerning the Indians losing the land in the manner above caused Congress to enact a statute clarifying part of the treaty. The Court said what Congress did would not affect the case:

Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles before given by the government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. The legislature may prescribe to the Executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act.

73 U.S. (6 Wall.) at 89. Thus, this case merely holds that a subsequent act of Congress cannot affect titles that were valid when conveyed. It does not control or even offer any assistance on the facts in the instant case.

[Continued]

land is transferred in a treaty in excess of statutory authorization, the transfer may be legalized by a subsequent act of "Congress" which in some affirmative manner indicates approval of the otherwise *ultra vires* act.

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<sup>37</sup> [Continued]

2. *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828), involved the validity of the judgment of a Territorial Court which ordered the purchaser of cotton salvaged from a shipwreck off Key West to make restitution to the insurer. The court held in an opinion by Chief Justice Marshall that the treaty with Spain ceded Florida to the United States and thereafter *Congress* was authorized to provide for the creation of territorial courts with admiralty jurisdiction. This upheld the establishment of a territorial court by the territorial legislature. The Court simply noted that *Congress* passed an act authorizing a Territorial Government, and that such government was thereby authorized to establish the court in question.

3. *Foster v. Neilson*, 27 U.S. (2 Pet.) 254 (1829): This case involved a dispute over land that was located in territory acquired by the Louisiana Purchase (the Treaty of Paris, 1803). Plaintiffs claimed under a grant from the Spanish Governor in 1804; defendants answered that the land had been ceded to the United States by France in 1803, and that plaintiffs grant was void. The dismissal of the petition was affirmed by the Supreme Court. First, the Court said that the "Legislature" had undertaken certain acts amounting to a construction of the 1803 Treaty which the court could not oppose. The Acts were passed by Congress, and concerned rules and regulations for the management of the new territories.

A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature. [*i.e.*, Congress].

27 U.S. (2 Pet.) at 309.

Part of the case also involved the construction of Art. VI of the 1819 Treaty with Spain which provided in effect that grants from Spain prior to the Treaty would be respected by the United States, *i.e.*, "ratified and confirmed." The question

2. *The Treaty of October 2, 1863 with the Red Lake and Pembina Bands of Chippewa Indians* (13 Stat. 667). —Appellee points to Art. IX of this treaty signed by

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was whether the treaty was self-executing with respect to the grants, or whether an Act of Congress was necessary to “ratify and confirm” and thereby respect the grants. The Court said the *Legislature* must act; that it had not done so here, and thus prior laws would be respected. The Court stated:

A treaty is in its nature a contract between two nations, not a Legislative Act. . . . Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, *whenever it operates of itself without the aid of any legislative provision*. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and *the Legislature must execute the contract before it can become a rule for the court*.

27 U.S. (2 Pet.) at 314 (emphasis added). This is not inconsistent with the position that a legislative provision is necessary under Art. IV to convey property of the United States. This case is not authority for the proposition that Congress has no role; if anything, it tends the other way.

4. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1834). This case concerns a treaty with the Cherokees. Petitioner (a missionary) was a prisoner who claimed that the law under which he was convicted was void, being repugnant to the United States Constitution. The opinion stated:

[The Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. The powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. . . . The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian na-



President Lincoln as an alleged transfer of property not consented to by Congress. That article provided: "there shall be *set apart from the tract hereby ceded* [to the

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tions, and consequently admits their rank among those powers who are capable of making treaties . . .

This language of the case does not approach the issues raised by the attempt to transfer and convey the Panama Canal and Railroad and other United States property.

5. *Crews v. Burcham*, 66 U.S. (1 Black) 352 (1861) is another case involving a reservation of Indian lands. The decision holds that the reservation creates an equitable estate. The opinion does not discuss the authority or power of Congress.

6. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866): The issue here was whether land belonging to the Shawnees was taxable by a county government. It was held that so long as the "treaties and laws of Congress" protect the Indians, they are immune from the operation of state laws. This recognizes the authority of *treaties and Congress* in said matters. The scope and authority of Congress was not otherwise discussed.

7. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1895) similarly does not control here. *Mitchel* and the United States both claimed certain land in Florida under deeds of conveyance. *Mitchel's* claims were based on deeds from Indian tribes, and the United States claims were asserted on the basis of the treaty with Spain. The issue was whose deed was superior. In stating the facts, the Court remarked:

In taking possession of Florida pursuant to the treaty, and in establishing a government in and over it, Congress have acted on the same principles as those which were adopted by this court in the former cases. *In the Act of 1821, for carrying the treaty into execution, Congress authorizes the vesting the whole power of government in such person as the president may direct for the maintaining the inhabitants in the free enjoyment of their property.*

34 U.S. (9 Pet.) at 736 (emphasis added). In so acting Congress was relying upon Art. IV, § 3, cl. 2, which was the source of its power to "*make all needful Rules and Regulations re-*

United States by the Bands of Chippewa Indians] a reservation of (640) six hundred and forty acres near the mouth of Thief River for the Chief 'Moose Dung' . . ."

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*specting the Territory . . .*" (Emphasis added). Thus, the power to make rules and regulations concerning the proper management of the new territories was recognized as existing in Congress, and since the power to dispose of United States property is subject to the same language of the Constitution, there is some support for concluding that such power was also vested exclusively in Congress. Of course, there are some inherent differences between the acquisition of property and the government of property after it is acquired; but we are not dealing here with a contemporaneous disposition of property that is being acquired, but instead are dealing with property that has belonged to the United States for a long time, some of it since 1903. So any reason for applying a different rule as to exclusivity is non-existent.

Thus there is no reason why *Congress* should not be recognized as possessing the exclusive power to dispose of Government property. In other words, if disposition of property is a concurrent power, the power in general must be concurrent with respect to *all aspects* of Art. IV, § 3, cl. 2. Since such power is *not* concurrent with respect to rules and regulations of newly acquired territory, it should not be concurrent with respect to the other powers in the relevant paragraph.

8. *United States v. Brooks*, 51 U.S. (10 How.) 442 (1850), involved the construction of a supplemental article to a treaty with the Caddo Indians. It held that *Indian Lands reserved* to Indians by treaty were held by them in fee simple since they acquired perfect title by treaty. Since it involves land *reserved* for Indians, it is in the same category as the other Indian treaty cases and it does not affect this case.

9. *Doe v. Wilson*, 64 U.S. (23 How.) 457, 461 (1859), involved Indian lands, but contains no reference to the scope of Congress' authority to dispose of property. The decision holds the Indian was a tenant-in-common with the United States and that the deed of conveyance by the Indian, which he executed prior to selection of the lands, conveyed the interest he would have taken if living.

[Continued]

The validity of the reservation to Chief Moose Dung was involved in *Jones v. Meehan*, 175 U.S. 1 (1899),<sup>38</sup> which considered the validity of a subsequent lease made by one who inherited from the chief. Appellee cites the court's decision upholding the lease for the rule that property of the United States may be transferred to individuals by treaty between the United States and Indian tribes *without any act of Congress* or any patent from the President. When the facts of this Indian treaty are analyzed, it is clear, however, that the authority of the case is limited to reservations of land made in treaties *between* the

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<sup>37</sup> [Continued]

10. The last two cites are *Blair v. Pathkiller*, 2 Yerg. 407 (1830), and *Harris v. Doe*, 4 Blackf. 369 (1837). They are state cases.

*Blair v. Pathkiller*, a Tennessee decision, involved a claim of title and the affect of Indian Treaties and state statutes enacted before the adoption of the Constitution of the United States. The *reservation* of 640 acres to the head of each Indian family was held valid pursuant to treaties with the Cherokees of 1817 and 1819. The court pointed out that part of the consideration paid to the Cherokee Nation for its title to the land ceded was the reservation to the Indians of certain lands which were the subject of the litigation.

*Harris v. Doe* is an Indiana Supreme Court decision on an action in ejectment from land ceded by the Miami Indians by treaty to the United States and by the same treaty granted to Lafontaine and son, the predecessors in title of the defendant. The trial judge charged the jury that it could consider as evidence a special law of Congress as confirming the fee in the predecessor of the defendant. This decision is subject to the same infirmities as support for appellee's treaty contention as the other Indian Treaty cases and is additionally weakened by the fact that Congress did find it necessary to enact a law to confirm the title of one who claimed under a treaty.

<sup>38</sup> In the Supreme Court, Later-Secretary of State, Frank B. Kellogg, was a counsel on the brief of appellee and Cushman K. Davis, one of the Plenipotentiaries of the United States in the 1898 Treaty with Spain, argued the case.

United States and Indian tribes, which were treated as being akin to nations. *See* following discussion of the Indian treaties.

3. *Summary.*—The early treaties with Indian tribes are *sui generis* as treaties. They are not treaties in the ordinary sense of the word as all have recognized since Congress in 1871 enacted a law prohibiting any “contract by treaty” with any Indian tribe or nations:

That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further,* That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Act of March 3, 1871, 16 Stat. 566. Had Indian treaties been true treaties in the constitutional sense *Congress* could not have prohibited the President from so contracting by treaty. While the Act took the form of providing that Indian tribes shall not be “acknowledged or recognized” as “independent,” the statute clearly prohibited the President from negotiating treaties with any Indian tribe that was “independent.” The Act was thus in form a clear restriction on the treaty power, but actually it recognized that the Indian treaties were something different than the treaties referred to in the Constitution.

They have special features that generally make them inapplicable as authority that a treaty can dispose of other types of United States property without an Act of Congress. This is true because generally the subject of the Indian treaties was land owned and occupied by the Indians, which the United States was buying or acquiring. The treaty “reserved” some of the land for the Indians. Thus, property of the United States was not *disposed* of by the treaty.



Attorney General Taney in an opinion on September 20, 1833 stated: "These reservations [of Indian land in treaties] are *excepted out of the grant made by treaty and did not pass by it*. Consequently the title remains as it was before the treaty, that is to say *the lands reserved are still held under the original title*." 175 U.S. at 12. Mr. Justice Nelson in *Gaines v. Michelson*, 50 U.S. (9 How.) 356 (1850), pointed out that in such transactions, "it was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He [the Indian] holds strictly speaking *not under the treaty* of cession but under his original title confirmed by the government in the act of agreeing to the reservation." 50 U.S. (9 How.) at 365.

In the *Per Curiam* opinion a statement in *Jones v. Meehan*, *supra*, 175 U.S. at 12-14, is cited as authority that the Taney opinion and the decision in *Gaines v. Michelson*, *supra*, were "irreconcilable with later Supreme Court opinions . . ." (*Per Curiam*, n.19). This may be explained by virtue of a change in the statute after *Jones v. Meehan*, *supra*, which eliminated the prohibition against individuals purchasing or leasing from any individual Indian. Act of June 30, 1834, c. 161, § 12, 4 Stat. 730.

But whether the treaty confirmed the Indian right or granted a new right is not dispositive of the question as to whether there was a disposition of territory or property belonging to the United States. Those treaties dwelt with territory and property and in doing so they dwelt with sovereignty over the territory and the right to individual patches of soil, as Chief Justice Marshall noted in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 542 (1823). They also in some instances involved disputed claims to both territory and soil. In settling on the tribes the reserved territory the sovereign rights of the respective parties were involved, but in the "reservation" of specific

acreage of *soil* to individual Indians, different claims were involved and this phase of the agreements was more concerned with what might be termed "property." It is clear that at one time such "reservations" were considered as a recognition of land already owned by the Indians. This would be particularly true where the Indian at the time actually occupied the soil. In any event even *Jones v. Meehan, supra*, recognized that the land reserved to Chief Moose Dung on his death passed to his eldest son "by the laws, customs, and usages of the tribe . . ." What the *Per Curiam* opinion, and many other opinions in this field fail to recognize is that the individual Indians acquired title by virtue of the *treaty* and that it is not completely correct to say that the United States granted the title. The treaties were the act of two governments. The Indians as possessors had far the greater claim to the extent that they actually occupied the soil and the grantors in the treaty were not solely the United States but included both signatories. And insofar as the right to the soil was concerned more came from the Indians than from the United States. It would hardly be correct to consider that soil actually occupied by an Indian for centuries was property belonging to the United States. The United States generally recognized the rights of such possessors, and though Indian *claims* to broad territory were only recognized as a right of occupancy, the reservation of individual tracts was on a different footing and generally by one device or another were found to be vested in fee simple in the actual Indian occupant. *Jones v. Meehan, supra*, 175 U.S. at 32, is a good example.

By way of conclusion on all these Indian treaties, in short, I deny that recognizing the ancestral right of Chief Moose Dung to pitch his teepee by the waters of Thief River is sufficient legal authority to give away the entire Panama Canal without benefit of Congress. Claiming support from such decision indicates the weak-

ness of appellee's case because the character of the two treaties, the relationship of the signatories, the consideration involved, the nature of our interest or claim to the property involved and our relationships to them are all different in material respects.

Therefore, the treaties with the Cherokees, the Chipewewa Indians, and the transfer to Chief Moose Dung do *not* constitute authority that the Panama Canal Zone property of the United States may be transferred to Panama without the approval of *the Congress*. The same general *modus operandi* was followed in other Indian treaties.

This also disposes of the decision in *Francis v. Francis*, 203 U.S. 233 (1906), cited in the *Per Curiam* opinion. That is another Indian treaty case which interpreted one of the usual "reservations" that the Indians customarily made when they transferred some of their lands to the United States by treaty. As in the other Indian treaty cases, the first Justice Harlan's opinion did not overturn the Chancellor's ruling that the named Indian "and his heirs" obtained a fee simple estate in Indian lands which were "reserved [and] did *not* pass to the United States by Treaty" (emphasis added) because under a rule of property in Michigan where the lands were located "[t]he term *reservation* was equivalent to an absolute grant." The result in that respect was not disturbed. Thus, again the peculiarities of a reservation by Indians of their own lands in a joint treaty with the United States, belies the fact that the title passed by the treaty was to property (soil) that actually belonged to the United States. A more accurate description of the actual situation would be that the Indians never relinquished their claim and the treaty confirmed their title. These Indian treaties thus, to a certain extent, fall within treaties dealing with disputed claims. The citation of *Francis* by the *Per Curiam* opinion at page 18

overlooks the fact that it was the treaty of *both* parties that vested complete title, not the sole act of the United States. The case does not hold that the United States could transfer the soil by deed.

It also goes without saying that even if the Indians and the United States could jointly convey property to an Indian by a reservation of soil that he claimed, such precedents are not authority for the United States transferring property to Panama that is owned outright by the United States. The Panama Canal Treaty is an unquestioned disposition of property of the United States. The Indian treaties disposed of disputed territory and recognized claims of individual Indians to particular soil. This case is of interest though for another reason: it holds that the President, "*without the authority of an act of Congress,*" was not authorized to agree in the Treaty to a proviso that none of the reserved Indian lands could be conveyed without his consent. To a certain extent this recognizes that in Indian treaties the title is not conveyed to reservees but more accurately is merely recognized. See 50 U.S. (9 How.) at 365.

## B. *Treaties With Foreign Nations*

1. *Treaty of February 22, 1819 between the United States and Spain (8 Stat 252).*—Spain ceded all of east and west Florida to the United States. The parties also agreed upon a boundary west of the Mississippi River beginning at the mouth of the Sabine River in the Gulf of Mexico, thence generally north and west to the Red River and the Arkansas River, and thence to the source of that river, and thence due west along the 42nd line of latitude to the South Sea (Pacific Ocean). On both sides of that boundary line, the respective parties ceded to each other their *claims* and pretentions to the territory in question. The treaty indicated that the parties did not know the precise source of the Arkansas River and,



particularly in the mountain areas, neither nation was sufficiently familiar with much of the areas traversed by the newly drawn boundary lines to know precisely what was accomplished. This indicated the "claim" nature of the asserted rights.

Taken by its four corners, this treaty is hardly a disposition of United States property. It is a mutual relinquishment of boundary claims which is a usual subject of diplomacy, particularly in undeveloped areas. The settlement of many boundary disputes are more the settlement of claims rather than transfers of property.<sup>39</sup>

2. *Treaty of August 9, 1842 between the United States and Great Britain (Webster-Ashburton Treaty) 8 Stat. 572.*—This settled the boundary between the United States and Canada from the east through the Great Lakes, the present boundary waters and thence to the Rocky Mountains along the 49th parallel. Like the prior treaty, the parties here did not know where the boundary line they drew would begin to run westward from the Lake of the Woods. One result of this arrangement was the odd "Northwest angle" in Minnesota, which is completely separated by water from all United States territory. The treaty recognized prior grants of land by both countries in disputed areas. This agreement is within the traditional treaty-making function and does not qualify as a disposition of territory. It would be hard to point to the transfer of any *property* that belonged to the United States. This treaty is a perfect example of the settlement, in many respects, of highly questionable claims and not of the transfer of territory or property.

3. *The Treaty of June 15, 1846 between the United States and Great Britain. The Oregon-Washington boundaries (9 Stat. 869).*—The treaty recited that there was "doubt and uncertainty . . . respecting the sovereign-

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<sup>39</sup> See notes 23 and 24, *supra*, and accompanying text.

ty and government of . . . the northwest coast of America . . . west of the Rocky Mountains." The treaty continued the boundary line westward from the Rocky Mountains along the 49th parallel, and recognized the navigational rights on the Columbia River of the Hudson Bay Company and of British subjects on an equal footing with American citizens. This is another example of the settlement of doubtful and uncertain claims of the respective parties and not a transfer of property.

4. *Treaty of February 1, 1933 between the United States and Mexico (84 Cong. Rec. 9824).*—This treaty rectified the boundary along the Rio Grande River in the vicinity of El Paso and the Juarez Valley. The treaty involved a typical, minor boundary matter. Nevertheless, this Treaty looked to Congress for approval: Art. VIII provided that "[e]ach Government shall respectively secure title . . . ." Art. VII also provided that "Lands within the rectified channel . . . [that] pass from . . . one country to . . . the other . . . shall be acquired in full ownership by the [respective] Government . . . ." The treaty was thus executory and, moreover, since it required the appropriation of money, it looked to supporting enactments by the Congress of the United States and did not purport to be self-executing.

5. *Treaty of August 29, 1963 between the United States and Mexico: Solution of El Chamizal, 15 U.S.T. 21.*—This relocated the shifting channel of the Rio Grande River in the vicinity of El Paso and Juarez, and drew a boundary line at the center of a new channel for the river. By this arrangement, 823.50 acres of former United States land was ceded to Mexico by the treaty. However, far from this being an instance where the President attempted to transfer United States territory or property by a self-executing treaty without prior congressional act, the treaty in Art. 6 specifically recognized the constitutional requirement and provided that the acqui-

sition of the lands be transferred to Mexico and the rights of way for that portion of the new river channel in the territory of the United States shall not occur until "after . . . the necessary legislation has been enacted for carry-it out . . ." This treaty thus supports appellant's contentions and not those of the appellee. That appropriations were also required may have been an additional reason for recognizing the constitutional role of Congress but that apparent necessity here has not caused the President to recognize the role of Congress. *Cf. Per Curiam* opinion, at 20 n.22. In its discussion of this Mexican treaty the *Per Curiam* opinion recognizes the necessity in that instance for approval by Congress because the treaty required implementing legislation (*Per Curiam* op., n. 22). The implementing legislation required by the Panama Canal Treaty will make that necessitated by the Mexican Treaty pale into insignificance.

6. *Treaty of November 23, 1970 between the United States and Mexico (23 U.S.T. 371).*—This is another instance where the treaty resolved boundary differences arising from the shifting of channels. This treaty likewise was contingent and not self-executing, Article ID provided, *i.e.*, that "the necessary legislation has been enacted for carrying it out." 23 U.S.T. 377. This is another treaty that supports appellants' contention and not those of the appellee.

7. *Treaty of November 22, 1971 between the United States and Honduras: Swan Islands (23 U.S.T. 2631).*—Both governments claimed sovereignty of the Swan Islands, but the United States had for many years maintained a navigation and communications facility there. By the treaty, the United States recognized the sovereignty of Honduras and transferred certain land, buildings, and equipment to Honduras. There was a second cooperative agreement whereby the United States was to operate the navigational facilities and Honduras was to

assume responsibility for a dock and landing strip. The United States retained title to a great number of buildings and equipment except the land, and by the treaty Honduras made the areas—sites—available to the United States. This was a cooperative program for continuation of meteorological and communication facilities in Swan Islands. To the extent that any property was transferred, it was certainly minimal and hardly justified legislation. It cannot be considered as authority for transferring eight billion dollars of United States property.

8. *Treaty of June 17, 1971 between the United States and Japan (23 U.S.T. 447).*—This related to the reversion of the Ryukyu (includes Okinawa) and Daito Islands. Some of this property may have been transferred pursuant to prior congressional enactments, *i.e.*, 40 U.S.C. §§ 511 and 512. Section 511 authorizes federal agencies having foreign excess property to dispose of such property. That is definitely authorization for the transfer of what would be excess property of the United States after the reduction of our military operations on Okinawa. The treaty relinquished in favor of Japan all rights and interests under Art. III of the Treaty of Peace with Japan of September 8, 1951. Japan in turn granted to the United States the use of facilities and areas in accordance with the treaty of January 19, 1960, which was the Treaty of Mutual Cooperation and Security providing for collective self-defense. Art. IX of this treaty terminated our *temporary right of military occupation*. It is hard to construe this treaty as authority for transferring United States property by treaty without implementing legislation.

9. *Treaty of January 25, 1955 between the United States and Panama (6 U.S.T. 2283).*—This treaty, as discussed earlier, provided for the transfers of certain property. Art. V provided for the conveyance to Panama of certain lands and improvements set forth in item



2 of the Memorandum of Understanding. This included certain specified lands, including the railway terminal operations in the city of Panama, and the railway passenger station, and Paitilla Point. The treaty, however, was not self-executing as Art. V recognized the need to comply with Art. IV, § 3, cl. 2 of the Constitution, as that Article provided that the transfer of property was "*subject to the enactment of legislation by the Congress,*" and with respect to the small amount of property in Art. VI and Art. VII, Congress *did* enact legislation with respect thereto.<sup>40</sup>

It must be recognized that no court has had any opportunity to pass on the validity of many of these provisions, because when property or rights are transferred in a foreign country pursuant to asserted or *de facto* authority, as the practical matter, it is difficult, if not impossible thereafter, to litigate or rescind the transfer.

### C. *Treaty Summary*

In sum, no substantial support can be found in any of the 11 treaties for appellee's contention. The Indian treaties do not support his position because of their very nature, *i.e.*, the land allegedly transferred to the Indian is his land which he reserves from transfer to the United States under the treaty. The treaties with Spain and Great Britain involved the settlement of boundary claims and this is not a boundary controversy. Indeed, it would be hard to convince Spain and the British that in these treaties, which expanded our frontiers to absorb all of Florida on the south and to stretch our boundary westward from the Louisiana Purchase to the Pacific Ocean between the 42nd and 49th parallels, the United States was disposing of its own property. Two of the three treaties with Mexico specifically recognized the need for congressional legislation and the third treaty implicitly

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<sup>40</sup> See note 18 *supra*.

recognized such necessity; the Honduras treaty involved very minimal amounts of property; the Japan treaty had statutory authority to transfer surplus war property and otherwise merely relinquish our temporary right of military occupation; and the 1955 Panamanian treaty specifically recognized that legislation by Congress was necessary to the transfer of United States property.

When these eleven treaties are examined and analyzed, and those are culled out wherein the constitutional requirements were complied with through the enactment by Congress of implementing legislation and thus strongly support the position of the appellant-Congressmen, it appears obvious that there is dearth, if not an almost complete absence, of any supporting authority for the action of the appellee in attempting to bypass the entire House of Representatives in this transfer to Panama of the tremendous amount of property of the United States that is here involved.

### CONCLUSION

From the foregoing it is concluded that a political question is not involved, that established procedures of the Department of State and past United States procedures involving similar agreements with Panama and others recognize and require that Congress approve the transfer of United States property, that the Restatement of Foreign Relations Law reaches the same conclusion, and that the adjudicated cases hold that the power to dispose of United States property is vested exclusively in the Congress. In my opinion, we should accordingly declare the law to be that those provisions of the pending treaty which dispose of territory or property belonging to the United States to the Republic of Panama cannot come into force under the Constitution of the United States until approved by the Congress. In my view, because of the parties involved, it would not be necessary to issue an injunction.

The Report of the Senate Committee on Foreign Relations of a much earlier date has much advice that could well be followed by the relevant parties in the present controversy:

The question has been debated how far Congress would be bound to give effect, in cases requiring its cooperation, to regulations by treaty on subjects put within its express province by the Constitution. Whichever may be the better opinion, the doubt supplies reason enough against putting the question to trial in other circumstances than those in which the concurrence of Congress may be safely assumed. And the reason is the stronger for this forbearance from the fact that in the contingency of conflict it would be not the interests only, but the faith, too, of the nation which might be compromised, as this would have been committed by the adoption of the treaty regulations.

The condition of the Government at this point is of peculiar delicacy as regards the arrangement of its imposts. Parties have been arrayed with vehemence and the greatest sensibility awakened on the subject. Regulation by treaty in these circumstances would doubtless be carried into effect by the House of Representatives. But the temper in which the supposed intrusion might be expected to be received would be anything but cordial or placid. Ought not the occasion to be considerable, the motive urgent, to warrant the exercise of the authority at this cost? This is a topic requiring only to be displayed, not dwelt on.

2 HINDS' PRECEDENTS § 1532, at 1000.

What is the great urgency for not recognizing the constitutional right and duty of the House of Representatives to pass on the transfer of the rare property here involved? The United States by the narrow margin of one vote was enticed into accepting Panama as the first

choice over Nicaragua for the location of the Canal, and the operating rights promised by Panama in the 1903 treaty were purposely designed to assure that the United States would build the Canal in Panama and not in Nicaragua.<sup>41</sup> Thereafter, a national treasure beyond compare in the form of an engineering marvel was created by the ingenuity and genius of American statesmen, builders, and doctors who persevered where all others had failed miserably, or failed even to begin. And with an expenditure by Congress of this nation's wealth never before equalled in history created an international public facility that has given Panama a healthful community it never before possessed, a much higher standard of living than its neighbors, and under benign United States' management benefited the entire world.

The transfer of United States territory and property in the Panama Canal Zone directly affects immense vital interests of the entire nation involving as it does significant commercial concerns and our national security. Some of these matters were pointed out by Senator Hiram Johnson of California in 1939, when, in speaking on the ratification of the Hull-Alfaro Treaty, which proposed certain amendments in our relations with Panama, he remarked:

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<sup>41</sup> Bunau-Varilla, Envoy Extraordinary for the Republic of Panama, in a negotiation of the treaty for the Canal decided that the prior treaty draft would not do:

The "indispensable condition of success" was to write a new treaty "so well adapted to American exigencies" that it would be certain to pass in the Senate by the required two-thirds majority. A failure to obtain that two-thirds majority, he was convinced, could still mean a Nicaragua canal after all. The major difference in the new treaty must be in the share of sovereignty attributed to the United States within the canal zone. [Perpetuity was already provided for.]

D. McCULLOUGH, *THE PATH BETWEEN THE SEAS* 391 (1977).



The Panama Canal will be protected, if protected, by us. The Panama Canal, if it be retained, and if it serve its purpose [as "the life line of the Republic," *id.*, 9838], will do so because of our efforts; and the Panama Canal, because of the peculiar relation we have to it, should not be in any degree tied, or hamstrung, or put in a strait jacket by a treaty made by the United States of America.

84 CONG. REC. 9838 (1939). The momentous nature of these national interests peculiarly qualify the House of Representatives for its constitutional role because it directly represents our entire citizenry on a uniform basis—which was the principal reason that the Framers of the Constitution directed that the entire Congress should pass on such matters.

However, regardless of disputes on other issues, one conclusion is certain. That is that if the present attempt successfully usurps the constitutional right and duty of the House of Representatives to vote on the disposition of United States' property of the tremendous magnitude and value of our Panama holdings a precedent of such enormity will be created that the constitutional right of the House of Representatives to vote on transfers of property to foreign nations need never again be seriously recognized.

To the extent that the President may have discretion to choose between proceeding by treaty or other forms of international agreement, he cannot avoid the constitutional requirement that the entire Congress pass on all attempts to dispose of United States' territory and property to other nations. All past practices in this field indicate that prior Presidents have recognized that obligation even when property of much less value and significance was involved.<sup>42</sup>

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<sup>42</sup> The Standing of the Members of the House of Representatives to Request a Declaration of the Law

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<sup>42</sup> [Continued]

The district court concluded that it lacked subject matter jurisdiction over plaintiffs' complaint because, in its view, plaintiffs had not met the "irreducible constitutional minimum" of a concrete injury in fact to their legislative roles." Memo. Op. at 12-13. I disagree with this conclusion.

Recently, we have considered cases involving standing of Congressmen to bring actions in the federal courts. Judge Wilkey's opinion in *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), provides a thorough discussion of the applicable analytical framework:

*The most basic point to consider is that there are no special standards for determining Congressional standing questions. Although the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same.*

*There is no single test or formula to be derived from the case law to determine if a particular complaining party has standing to sue. Rather, the case law provides a series of inquiries designed primarily<sup>68</sup> to determine if the complaining party has suffered some injury in fact.*

553 F.2d at 204, 205-06 (emphasis original). The injury in fact requirement is constitutionally mandated; it is one of the requirements designed to implement the Art. III "case or controversy" limitation on federal judicial power. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970); *Harrington v. Bush*, *supra*, 553 F.2d at 206. Footnote 68 in the *Harrington* opinion outlined the four separate inquiries demanded by the Supreme Court cases on standing: (1) first, and most important, that there be an injury in fact; (2) that the interests being asserted by the plaintiffs are within the zone of interests to be protected by the statute or constitutional guarantee in question; (3) that the injury result from (or be caused by) the challenged "illegal" action; and (4) that the injury be capable of being redressed by a favorable decision. 553 F.2d at 205-06 n. 68. The district court found no injury in fact, and therefore had no reason to consider the other three inquiries. As to the critical question of whether an injury in fact exists, it is my conclusion that it does.

The prior cases in this circuit provide examples of how the analytical scheme articulated in *Harrington* applies to par-

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ticular situations. *Kennedy v. Sampson*, 167 U.S.App.D.C. 192, 511 F.2d 430 (1974), involved Senator Kennedy's suit against the Administrator of the General Services Administration and the Chief of the White House Records seeking a declaration that the Family Practice of Medicine Act become law on December 25, 1970, and an order requiring appellants to publish the Act as a validly enacted law. The question on the merits was the effect of President Nixon's pocket veto; a preliminary question was the standing of Sen. Kennedy to bring the suit. The court found that Kennedy had standing, as a "logical nexus" existed between the status he asserted and the claim sought to be adjudicated:

If appellants' arguments are accepted, then appellee's vote in favor of the bill in question has been nullified and appellee has no right to demand or participate in a vote to override the President's veto. Conversely, if appellee's interpretation of the veto clause is correct, then the bill became law without the President's signature. In short, disposition of the substantive issue will determine the effectiveness *vel non* of appellee's actions as a legislator with respect to the legislation in question.

511 F.2d at 433. Thus, in *Kennedy*, the facts presented a situation where the Executive's action had in effect nullified the Senator's vote; the validity of the action was determinative on the effect of the vote. And particularly he had been prevented from exercising his constitutional right to vote on the motion to overrule. In such circumstance, this court concluded that Senator Kennedy had standing to challenge the vote.

In *Mitchell v. Laird*, 159 U.S.App.D.C. 344, 488 F.2d 611 (1973), in dictum, we recognized the standing of thirteen members of the House of Representatives to litigate presidential war powers, when we stated that a declaratory judgment

would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation. In

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our view, these considerations are sufficient to give plaintiffs a standing to make their complaint.

488 F.2d at 614.

We concluded that plaintiffs lacked standing to bring their claims in both *Harrington, supra*, and in *Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977). Neither plaintiff had demonstrated a cognizable injury to his person or to his ability to function as a legislator. Nothing impeded the legislative process whatsoever. Representative Harrington sought a declaration that certain foreign and domestic activities of the Central Intelligence Agency were illegal and also an injunction prohibiting the CIA from using the funding and reporting provisions of the Central Intelligence Agency Act of 1949 in connection with allegedly illegal activities. After an extensive analysis of the supposed injuries claimed by the plaintiff, we concluded:

Since the appellant in this case has suffered no injury in a constitutional sense, he is in effect seeking to use the court to vindicate his own political values and preferences. By so doing, appellant is asking us in large part to usurp the legislative function and to grant him the relief *which his colleagues have refused him*.

553 F.2d at 215 (emphasis added). Since appellant failed to show an injury in fact in the constitutional sense, we affirmed the district court's dismissal of his complaint.

A similar situation was posed in the *Metcalf* case, where Senator Metcalf sought declaratory and injunctive relief, alleging that the National Petroleum Council was unlawfully functioning as an advisory committee in violation of the Federal Advisory Committee Act and the Federal Energy Administration Act. He contended that the Council was not fairly balanced in membership and was improperly influenced by certain petroleum industry interest groups. We noted that his complaint was a generalized grievance that did not allege any specific, objective, present harm or threat of harm; the nature and effect of the unspecified harm was indeterminate. 553 F.2d at 187-88. Nothing impeded the functioning of Sen. Metcalf in his role as a legislator, and we affirmed the district court's dismissal of the complaint.

We next considered a claimed controversy involving seventeen Congressmen who challenged General Services Administration regulations authorizing agencies to grant rights to



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patents and inventions developed from federal funds. Our decision in *Public Citizen v. Sampson*, 169 U.S.App.D.C. 301, 515 F.2d 1018 (D.C. Cir. 1975), affirmed without opinion the decision of the district court, reported at 379 F. Supp. 662, granting the defendant's motion to dismiss the complaint. In evaluating plaintiffs' standing as Congressmen, the district court stated:

It is beyond peradventure that plaintiff Congressmen could tomorrow propose legislation regulating the contractual authority of the General Services Administration.

379 F. Supp. at 667. The powers of the plaintiff Congressmen in that case as Representatives were not diminished in any respect.

As noted above, an injury in fact is required for standing in all cases; with respect to Congressmen as plaintiffs, the case law in this circuit, not surprisingly, demonstrates that this court will demand a showing of an injury in fact. We could not otherwise justify our jurisdiction. In all cases, this requirement helps guarantee that the "controversy" has sufficient adverseness and that the parties have sufficient interests to make out a justiciable dispute that satisfies the Art. III case or controversy requirement. Yet in the Congressmen cases, another dimension underlies our insistence on an injury in fact. Our prior cases express concern that Congressmen might seek redress in the courts simply because they failed to persuade their colleagues in making a particular legislative judgment, or they fear that they cannot succeed in a future vote on a particular matter of legislative concern. To grant such Congressmen standing to litigate their claims in the judicial system would have the effect of circumventing the legislative process. In cases in which this court has found the existence of standing, which means that an injury in fact was found to exist, there is no apparent risk that the legislative process will be circumvented or evaded by deciding the case on the merits. It is my opinion that the Congressmen in this case have suffered and are presently suffering an injury in fact, and that the concern which underlies our prior cases—namely, that we have no jurisdiction where a Member of Congress is seeking to evade the legislative process—is simply not a factor in this case.

On September 16, 1977, President Carter transmitted to the Senate for advice and consent to ratification two treaties—

the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, and the Panama Canal Treaty. In our opinion we only consider the transfers of property provided for by the Canal Treaty and not any of the rules and regulations concerning the operations of the Canal that are in the Neutrality Treaty. The transmittal to the Senate was made without the inclusion of the usual provisions that is inserted in treaties and international agreements when any participation by the House of Representatives is called for. By this act, President Carter conformed to an earlier opinion of August 11, 1977 by the Attorney General stating that the approval of the treaties by the House of Representatives even "absent statutory authorization" was not necessary even though the Canal Treaty disposed of United States property. The procedures implemented for obtaining the Senate's advice and consent, which continue today, did not and do not contemplate approval by the House of Representatives to any portion of the treaties. It is my view that the injury in fact to the members of the House of Representatives occurred when President Carter transmitted the treaty in the form described above, *i.e.*, without the customary provisions for enactment of necessary legislation by Congress where United States property was to be transferred. At this point, because of the form of the treaty, it was clear that the House of Representatives could not participate, and insofar as Art. IV required its participation, that this constitutional requirement was being violated. This is a sufficient injury to accord standing. This injury in fact was further substantiated when the Report of the Committee on Foreign Relations of the Senate acceded to the opinion of the Attorney General of August 11, 1977. Senate Executive Report N, No. 95-12, 95th Cong., 1st Sess. 65-69, February 3, 1978.

The central point posed by the Congressmen's claim is that Art. IV, § 3, cl. 2 requires that the House *participate* in the disposition of property: an Act of Congress, it is alleged, is required by the Constitution. The submission of the treaty to the Senate in its present form (*See Appendix*) clearly obviates any participation of the House and since the Senate is presently concurring in that decision, whatever action the House may take is effectively blocked by the President and the Senate. It appears *extremely unlikely*—a near certainty—that the Senate will amend the treaty as submitted to permit House participation in the disposition of property. The Report of the Senate Committee on Foreign Relations states:

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The Committee finds that the . . . Panama Canal Treaty can validly transfer to Panama property belonging to the United States without a need for implementing legislation.

Committee Report at 69. It is extremely unlikely that the Committee will change its position on this issue and recommend that implementing legislation be sought. It is extremely unlikely that the Senate as a whole will reject the recommendation of its Committee on this point. The injury that occurred when the advise and consent procedures were initiated continues so long as the treaty remains in its present form and House concurrence is not sought. Thus, the entire membership of the House of Representatives is suffering *present* injury to its constitutional rights.

On August 11, 1977, Attorney General Bell issued his opinion on the procedures necessary for disposition of property, with special reference to the ratification procedures for the Panama Canal Treaty. This opinion was cited and relied upon by the Senate Foreign Relations Committee. Committee Report, at 69. Therein, Attorney General Bell opined that a treaty may dispose of territory or property belonging to the United States absent statutory authorization. While an Attorney General's opinion is not binding on a court, *see Harris County Commrs. v. Moore*, 420 U.S. 77, 87 n.10 (1975); *McElroy v. Guagliardo*, 361 U.S. 281, 285 (1960); *Romero v. Coldwell*, 455 F.2d 1163, 1165 (5th Cir. 1972), there is considerable authority that it is binding on an executive official who requests the opinion on a matter of law. Here, the Secretary of State requested the opinion, and the Bell opinion is definitive on the ratification procedure to be employed.

A long line of Attorney General opinions state that the teaching in the opinion is binding as a matter of law on those who request it. 5 OP. ATTY GEN. 97, 97 (1849); 6 OP. ATTY GEN. 326, 334 (1854); 20 OP. ATTY GEN. 654, 659 (1893); 25 OP. ATTY GEN. 301, 303-04 (1904). In *Smith v. Jackson*, 246 U.S. 388 (1918), the Court stated:

[W]e are of opinion that it is obvious on the face of the statement of the case that the auditor had no power to refuse to carry out the law, and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General, and second, beyond



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all possible question, to the judgments of the courts below.

246 U.S. at 390-91. *United States Bedding Co. v. United States*, 55 Ct. Cl. 459, 460-61 (1920) is to the same effect. The general rule does not apply when the matter is within the proper discretion of a department official; hence, the statement has been made that opinions are only entitled to weight and are not controlling. In those circumstances, the point is simply that an opinion is not controlling in a proper area of discretion. *See Senske v. Fairmont & Waseca Canning Co.*, 232 Minn. 350, 359-60, 45 N.W.2d 640, 646-47 (1951); 17 OP. ATTY GEN. 332, 333 (1882).

Hence, it is clear that the opinion of Attorney General Bell with respect to the procedure by which the treaties would be ratified was, in effect, binding on the Secretary who requested it. This buttresses our conclusion that the procedure, which did not and does not involve the House, was solidified at the beginning of the transmittal process, and the injury in fact was suffered at that time.

This injury has some similarities to that suffered in *Kennedy*; the right to vote is effectively denied by the challenged action. It is claimed by appellee that the House is free to vote on any version of the treaty; but the procedure is already decided, and the ratification process is underway. As far as the President and Senate are concerned, any action taken by the House is irrelevant and inconsequential. The House is, in fact, being denied its right to participate, and the existence of this circumstance is enough to confer standing on this court to declare the law. This is quite distinct from the situation in *Metcalf* and *Harrington* where the plaintiffs were free to enact subsequent legislation which *could affect the merits of the issues*. Here, there is nothing the House can do which will alter the fact that they are being denied any present role in the process, as may be required by the Constitution. Moreover, there is no suggestion here that a judicial ruling on the merits will circumvent the legislative process in any way. Rather, the judicial ruling sought here would *protect and implement* the constitutional legislative process.

Under these circumstances, applying the relevant precedents in this circuit and the general principles outlined by the Supreme Court, it must be said that the plaintiffs have suffered an injury in fact sufficient to confer standing. A self-executing treaty means that if it is ratified, and the exchange of



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documents with Panama causes it to come into force, any objection by the House of Representatives or any other person as to its validity will receive the reply that Buanu-Varilla gave to Federico Boyd in 1903 that protestations would be pointless "as everything is finished." D. McCULLOUGH, *supra* note 41, at 395.

There can be no serious dispute about plaintiffs satisfying the other three inquiries relating to standing. Clearly, the denial of the Congressmen's participatory role in the disposition of property is "within the zone of interests to be protected or regulated by the . . . Constitutional guarantee in question." Ass'n of Data Processing Serv. Organization, Inc. v. Camp, 397 U.S. 150, 153 (1970). Also, the injury must be such "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Here, it is the President's submission of the treaties to the Senate without provisions calling for *Congress* to act in the disposition of United States property which has *caused* the denial of the plaintiffs' participatory role under the Constitution in the disposition of property. Finally, the injury must be one "likely to be redressed by a favorable decision." *Id.*, 426 U.S. at 38. A judicial decision interpreting the Constitution and declaring the law on the controversy can afford the plaintiffs the precise relief that they request—their participation in the disposition of property to the extent that same is provided for by the Constitution.

It is my view that plaintiffs have standing to bring this action.

## (APPENDIX)

TEXTS OF TREATIES RELATING TO  
THE PANAMA CANAL

## PANAMA CANAL TREATY

The United States of America and the Republic of Panama,

*Acting* in the spirit of the Joint Declaration of April 3, 1964, by the Representatives of the Governments of the United States of America and the Republic of Panama, and of the Joint Statement of Principles of February 7, 1974, initialed by the Secretary of State of the United States of America and the Foreign Minister of the Republic of Panama, and

*Acknowledging* the Republic of Panama's sovereignty over its territory,

*Have decided* to terminate the prior Treaties pertaining to the Panama Canal and to conclude a new Treaty to serve as the basis for a new relationship between them and, accordingly, have agreed upon the following:

## ARTICLE I

ABROGATION OF PRIOR TREATIES AND ESTABLISHMENT  
OF A NEW RELATIONSHIP

1. Upon its entry into force, this Treaty terminates and supersedes:

(a) The Isthmian Canal Convention between the United States of America and the Republic of Panama, signed at Washington, November 18, 1903;

(b) The Treaty of Friendship and Cooperation signed at Washington, March 2, 1936, and the Treaty of Mutual Understanding and Cooperation and the related

Memorandum of Understandings Reached, signed at Panama, January 25, 1955, between the United States of America and the Republic of Panama;

(c) All other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama concerning the Panama Canal which were in force prior to the entry into force of this Treaty; and

(d) Provisions concerning the Panama Canal which appear in other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama which were in force prior to the entry into force of this Treaty.

2. In accordance with the terms of this Treaty and related agreements, the Republic of Panama, as territorial sovereign, grants to the United States of America, for the duration of this Treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal. The Republic of Panama guarantees to the United States of America the peaceful use of the land and water areas which it has been granted the rights to use for such purposes pursuant to this Treaty and related agreements.

3. The Republic of Panama shall participate increasingly in the management and protection and defense of the Canal, as provided in this Treaty.

4. In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal.

## ARTICLE II

## RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, six calendar months from the date of the exchange of the instruments of ratification.

2. This Treaty shall terminate at noon, Panama time, December 31, 1999.

## ARTICLE III

## CANAL OPERATION AND MANAGEMENT

1. The Republic of Panama, as territorial sovereign, grants to the United States of America the rights to manage, operate, and maintain the Panama Canal, its complementary works, installations and equipment and to provide for the orderly transit of vessels through the Panama Canal. The United States of America accepts the grant of such rights and undertakes to exercise them in accordance with this Treaty and related agreements.

2. In carrying out the foregoing responsibilities, the United States of America may:

(a) Use for the aforementioned purposes, without cost except as provided in this Treaty, the various installations and areas (including the Panama Canal) and waters, described in the Agreement in Implementation of



this Article, signed this date, as well as such other areas and installations as are made available to the United States of America under this Treaty and related agreements, and take the measures necessary to ensure sanitation of such areas;

(b) Make such improvements and alterations to the aforesaid installations and areas as it deems appropriate, consistent with the terms of this Treaty;

(c) Make and enforce all rules pertaining to the passage of vessels through the Canal and other rules with respect to navigation and maritime matters, in accordance with this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules;

(d) Establish, modify, collect and retain tolls for the use of the Panama Canal, and other charges, and establish and modify methods of their assessment;

(e) Regulate relations with employees of the United States Government;

(f) Provide supporting services to facilitate the performance of its responsibilities under this Article;

(g) Issue and enforce regulations for the effective exercise of the rights and responsibilities of the United States of America under this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules; and

(h) Exercise any other right granted under this Treaty, or otherwise agreed upon between the two Parties.

3. Pursuant to the foregoing grant of rights, the United States of America shall, in accordance with the terms of this Treaty and the provisions of United States law, carry out its responsibilities by means of a United States Government agency called the Panama Canal Com-

mission, which shall be constituted by and in conformity with the laws of the United States of America.

(a) The Panama Canal Commission shall be supervised by a Board composed of nine members, five of whom shall be nationals of the United States of America, and four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States of America in a timely manner.

(b) Should the Republic of Panama request the United States of America to remove a Panamanian national from membership on the Board, the United States of America shall agree to such request. In that event, the Republic of Panama shall propose another Panamanian national for appointment by the United States of America to such position in a timely manner. In case of removal of a Panamanian member of the Board at the initiative of the United States of America, both Parties will consult in advance in order to reach agreement concerning such removal, and the Republic of Panama shall propose another Panamanian national for appointment by the United States of America in his stead.

(c) The United States of America shall employ a national of the United States of America as Administrator of the Panama Canal Commission, and a Panamanian national as Deputy Administrator, through December 31, 1989. Beginning January 1, 1990, a Panamanian national shall be employed as the Administrator and a national of the United States of America shall occupy the position of Deputy Administrator. Such Panamanian nationals shall be proposed to the United States of America by the Republic of Panama for appointment to such positions by the United States of America.

(d) Should the United States of America remove the Panamanian national from his position as Deputy Administrator, or Administrator, the Republic of Panama

shall propose another Panamanian national for appointment to such position by the United States of America.

4. An illustrative description of the activities the Panama Canal Commission will perform in carrying out the responsibilities and rights of the United States of America under this Article is set forth at the Annex. Also set forth in the Annex are procedures for the discontinuance or transfer of those activities performed prior to the entry into force of this Treaty by the Panama Canal Company or the Canal Zone Government which are not to be carried out by the Panama Canal Commission.

5. The Panama Canal Commission shall reimburse the Republic of Panama for the costs incurred by the Republic of Panama in providing the following public services in the Canal operating areas and in housing areas set forth in the Agreement in Implementation of Article III of this Treaty and occupied by both United States and Panamanian citizen employees of the Panama Canal Commission: police, fire protection, street maintenance, street lighting, street cleaning, traffic management and garbage collection. The Panama Canal Commission shall pay the Republic of Panama the sum of ten million United States dollars (\$10,000,000) per annum for the foregoing services. It is agreed that every three years from the date that this Treaty enters into force, the costs involved in furnishing said services shall be reexamined to determine whether adjustment of the annual payment should be made because of inflation and other relevant factors affecting the cost of such services.

6. The Republic of Panama shall be responsible for providing, in all areas comprising the former Canal Zone, services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing, in accordance with this Treaty and related agreements.

7. The United States of America and the Republic of Panama shall establish a Panama Canal Consultative Committee, composed of an equal number of high-level representatives of the United States of America and the Republic of Panama, and which may appoint such subcommittees as it may deem appropriate. This Committee shall advise the United States of America and the Republic of Panama on matters of policy affecting the Canal's operation. In view of both Parties' special interest in the continuity and efficiency of the Canal operation in the future, the Committee shall advise on matters such as general tolls policy, employment and training policies to increase the participation of Panamanian nationals in the operation of the Canal, and international policies on matters concerning the Canal. The Committee's recommendations shall be transmitted to the two Governments, which shall give such recommendations full consideration in the formulation of such policy decisions.

8. In addition to the participation of Panamanian nationals at high management levels of the Panama Canal Commission, as provided for in paragraph 3 of this Article, there shall be growing participation of Panamanian nationals at all other levels and areas of employment in the aforesaid commission, with the objective of preparing, in an orderly and efficient fashion, for the assumption by the Republic of Panama of full responsibility for the management, operation and maintenance of the Canal upon the termination of this Treaty.

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.



10. Upon entry into force of this Treaty, the United States Government agencies known as the Panama Canal Company and the Canal Zone Government shall cease to operate within the territory of the Republic of Panama that formerly constituted the Canal Zone.

## ARTICLE IV

### PROTECTION AND DEFENSE

1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date. The use of areas and installations and the legal status of the armed forces of the United States of America in the Republic of Panama shall be governed by the aforesaid Agreement.

3. In order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defense of the Canal, the United States of America and the Republic of Panama shall establish a Combined Board comprised of an equal number of senior military representatives of each Party. These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defense of the Canal, and with planning for

actions to be taken in concert for that purpose. Such combined protection and defense arrangements shall not inhibit the identity or lines of authority of the armed forces of the United States of America or the Republic of Panama. The Combined Board shall provide for coordination and cooperation concerning such matters as:

(a) The preparation of contingency plans for the protection and defense of the Canal based upon the cooperative efforts of the armed forces of both Parties;

(b) The planning and conduct of combined military exercises; and

(c) The conduct of United States and Panamanian military operations with respect to the protection and defense of the Canal.

4. The Combined Board shall, at five-year intervals throughout the duration of this Treaty, review the resources being made available by the two Parties for the protection and defense of the Canal. Also, the Combined Board shall make appropriate recommendations to the two Governments respecting projected requirements, the efficient utilization of available resources of the two Parties, and other matters of mutual interest with respect to the protection and defense of the Canal.

5. To the extent possible consistent with its primary responsibility for the protection and defense of the Panama Canal, the United States of America will endeavor to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of that of the armed forces of the United States of America in the territory of the former Canal Zone immediately prior to the entry into force of this Treaty.

## ARTICLE V

## PRINCIPLE OF NON-INTERVENTION

Employees of the Panama Canal Commission, their dependents and designated contractors of the Panama Canal Commission, who are nationals of the United States of America, shall respect the laws of the Republic of Panama and shall abstain from any activity incompatible with the spirit of this Treaty. Accordingly, they shall abstain from any political activity in the Republic of Panama as well as from any intervention in the internal affairs of the Republic of Panama. The United States of America shall take all measures within its authority to ensure that the provisions of this Article are fulfilled.

## ARTICLE VI

## PROTECTION OF THE ENVIRONMENT

1. The United States of America and the Republic of Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment.

2. A Joint Commission on the Environment shall be established with equal representation from the United States of America and the Republic of Panama, which shall periodically review the implementation of this Treaty and shall recommend as appropriate to the two Governments ways to avoid or, should this not be possible, to mitigate the adverse environmental impacts which might result from their respective actions pursuant to the Treaty.

3. The United States of America and the Republic of Panama shall furnish the Joint Commission on the Environment complete information on any action taken in accordance with this Treaty which, in the judgment of both, might have a significant effect on the environment. Such information shall be made available to the Commission as far in advance of the contemplated action as possible to facilitate the study by the Commission of any potential environmental problems and to allow for consideration of the recommendation of the Commission before the contemplated action is carried out.

## ARTICLE VII

### FLAGS

1. The entire territory of the Republic of Panama, including the areas the use of which the Republic of Panama makes available to the United States of America pursuant to this Treaty and related agreements, shall be under the flag of the Republic of Panama, and consequently such flag always shall occupy the position of honor.

2. The flag of the United States of America may be displayed, together with the flag of the Republic of Panama, at the headquarters of the Panama Canal Commission, at the site of the Combined Board, and as provided in the Agreement in Implementation of Article IV of this Treaty.

3. The flag of the United States of America also may be displayed at other places and on some occasions, as agreed by both Parties.

## ARTICLE VIII

### PRIVILEGES AND IMMUNITIES

1. The installations owned or used by the agencies or instrumentalities of the United States of America



operating in the Republic of Panama pursuant to this Treaty and related agreements, and their official archives and documents, shall be inviolable. The two Parties shall agree on procedures to be followed in the conduct of any criminal investigation at such locations by the Republic of Panama.

2. Agencies and instrumentalities of the Government of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements shall be immune from the jurisdiction of the Republic of Panama.

3. In addition to such other privileges and immunities as are afforded to employees of the United States Government and their dependents pursuant to this Treaty the United States of America may designate up to twenty officials of the Panama Canal Commission who, along with their dependents, shall enjoy the privileges and immunities accorded to diplomatic agents and their dependents under international law and practice. The United States of America shall furnish to the Republic of Panama a list of the names of said officials and their dependents, identifying the positions they occupy in the Government of the United States of America, and shall keep such list current at all times.

## ARTICLE IX

### APPLICABLE LAWS AND LAW ENFORCEMENT

1. In accordance with the provisions of this Treaty and related agreements, the law of the Republic of Panama shall apply in the areas made available for the use of the United States of America pursuant to this Treaty. The law of the Republic of Panama shall be applied to matters or events which occurred in the former Canal Zone prior to the entry into force of this Treaty

only to the extent specifically provided in prior treaties and agreements.

2. Natural or juridical persons who, on the date of entry into force of this Treaty, are engaged in business or non-profit activities at locations in the former Canal Zone may continue such businesses or activities at those locations under the same terms and conditions prevailing prior to the entry into force of this Treaty for a thirty-month transition period from its entry into force. The Republic of Panama shall maintain the same operating conditions as those applicable to the aforementioned enterprises prior to the entry into force of this Treaty in order that they may receive licenses to do business in the Republic of Panama subject to their compliance with the requirements of its law. Thereafter, such persons shall receive the same treatment under the law of the Republic of Panama as similar enterprises already established in the rest of the territory of the Republic of Panama without discrimination.

3. The rights of ownership, as recognized by the United States of America, enjoyed by natural or juridical private persons in buildings and other improvements to real property located in the former Canal Zone shall be recognized by the Republic of Panama in conformity with its laws.

4. With respect to buildings and other improvements to real property located in the Canal operating areas, housing areas or other areas subject to the licensing procedure established in Article IV of the Agreement in Implementation of Article III of this Treaty, the owners shall be authorized to continue using the land upon which their property is located in accordance with the procedures established in that Article.

5. With respect to buildings and other improvements to real property located in areas of the former Canal Zone

to which the aforesaid licensing procedure is not applicable, or may cease to be applicable during the lifetime or upon termination of this Treaty, the owners may continue to use the land upon which their property is located, subject to the payment of a reasonable charge to the Republic of Panama. Should the Republic of Panama decide to sell such land, the owners of the buildings or other improvements located thereon shall be offered a first option to purchase such land at a reasonable cost. In the case of non-profit enterprises, such as churches and fraternal organizations, the cost of purchase will be nominal in accordance with the prevailing practice in the rest of the territory of the Republic of Panama.

6. If any of the aforementioned persons are required by the Republic of Panama to discontinue their activities or vacate their property for public purposes, they shall be compensated at fair market value by the Republic of Panama.

7. The provisions of paragraphs 2-6 above shall apply to natural or juridical persons who have been engaged in business or non-profit activities at locations in the former Canal Zone for at least six months prior to the date of signature of this Treaty.

8. The Republic of Panama shall not issue, adopt or enforce any law, decree, regulation, or international agreement or take any other action which purports to regulate or would otherwise interfere with the exercise on the part of the United States of America of any right granted under this Treaty or related agreements.

9. Vessels transiting the Canal, and cargo, passengers and crews carried on such vessels shall be exempt from any taxes, fees, or other charges by the Republic of Panama. However, in the event such vessels call at a Panamanian port, they may be assessed charges incident thereto, such as charges for services provided to the

vessel. The Republic of Panama may also require the passengers and crew disembarking from such vessels to pay such taxes, fees and charges as are established under Panamanian law for persons entering its territory. Such taxes, fees and charges shall be assessed on a nondiscriminatory basis.

10. The United States of America and the Republic of Panama will cooperate in taking such steps as may from time to time be necessary to guarantee the security of the Panama Canal Commission, its property, its employees and their dependents, and their property, the Forces of the United States of America and the members thereof, the civilian component of the United States Forces, the dependents of members of the Forces and the civilian component, and their property, and the contractors of the Panama Canal Commission and of the United States Forces, their dependents, and their property. The Republic of Panama will seek from its Legislative Branch such legislation as may be needed to carry out the foregoing purposes and to punish any offenders.

11. The Parties shall conclude an agreement whereby nationals of either State, who are sentenced by the courts of the other State, and who are not domiciled therein, may elect to serve their sentences in their State of nationality.

## ARTICLE X

### EMPLOYMENT WITH THE PANAMA CANAL COMMISSION

1. In exercising its rights and fulfilling its responsibilities as the employer, the United States of America shall establish employment and labor regulations which shall contain the terms, conditions and prerequisites for all categories of employees of the Panama Canal Commission. These regulations shall be provided to the Republic of Panama prior to their entry into force.



2. (a) The regulations shall establish a system of preference when hiring employees, for Panamanian applicants possessing the skills and qualifications required for employment by the Panama Canal Commission. The United States of America shall endeavor to ensure that the number of Panamanian nationals employed by the Panama Canal Commission in relation to the total number of its employees will conform to the proportion established for foreign enterprises under the law of the Republic of Panama.

(b) The terms and conditions of employment to be established will in general be no less favorable to persons already employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, than those in effect immediately prior to that date.

3. (a) The United States of America shall establish an employment policy for the Panama Canal Commission that shall generally limit the recruitment of personnel outside the Republic of Panama to persons possessing requisite skills and qualifications which are not available in the Republic of Panama.

(b) The United States of America will establish training programs for Panamanian employees and apprentices in order to increase the number of Panamanian nationals qualified to assume positions with the Panama Canal Commission, as positions become available.

(c) Within five years from the entry into force of this Treaty, the number of United States nationals employed by the Panama Canal Commission who were previously employed by the Panama Canal Company shall be at least twenty percent less than the total number of United States nationals working for the Panama Canal Company immediately prior to the entry into force of this Treaty.

(d) The United States of America shall periodically inform the Republic of Panama, through the Coordinating Committee, established pursuant to the Agreement in Implementation of Article III of this Treaty, of available positions within the Panama Canal Commission. The Republic of Panama shall similarly provide the United States of America any information it may have as to the availability of Panamanian nationals claiming to have skills and qualifications that might be required by the Panama Canal Commission, in order that the United States of America may take this information into account.

4. The United States of America will establish qualification standards for skills, training and experience required by the Panama Canal Commission. In establishing such standards, to the extent they include a requirement for a professional license, the United States of America, without prejudice to its right to require additional professional skills and qualifications, shall recognize the professional licenses issued by the Republic of Panama.

5. The United States of America shall establish a policy for the periodic rotation, at a maximum of every five years, of United States citizen employees and other non-Panamanian employees, hired after the entry into force of this Treaty. It is recognized that certain exceptions to the said policy of rotation may be made for sound administrative reasons, such as in the case of employees holding positions requiring certain non-transferable or non-recruitable skills.

6. With regard to wages and fringe benefits, there shall be no discrimination on the basis of nationality, sex, or race. Payments by the Panama Canal Commission of additional remuneration, or the provision of other benefits, such as home leave benefits, to United States nationals employed prior to entry into force of this Treaty, or to persons of any nationality, including Panamanian nationals who are thereafter recruited outside of the Repub-

lic of Panama and who change their place of residence, shall not be considered to be discrimination for the purpose of this paragraph.

7. Persons employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, who are displaced from their employment as a result of the discontinuance by the United States of America of certain activities pursuant to this Treaty, will be placed by the United States of America, to the maximum extent feasible, in other appropriate jobs with the Government of the United States in accordance with United States Civil Service regulations. For such persons who are not United States nationals, placement efforts will be confined to United States Government activities located within the Republic of Panama. Likewise, persons previously employed in activities for which the Republic of Panama assumes responsibility as a result of this Treaty will be continued in their employment to the maximum extent feasible by the Republic of Panama. The Republic of Panama shall, to the maximum extent feasible, ensure that the terms and conditions of employment applicable to personnel employed in the activities for which it assumes responsibility are no less favorable than those in effect immediately prior to the entry into force of this Treaty. Non-United States nationals employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty who are involuntarily separated from their positions because of the discontinuance of an activity by reason of this Treaty, who are not entitled to an immediate annuity under the United States Civil Service Retirement System, and for whom continued employment in the Republic of Panama by the Government of the United States of America is not practicable, will be provided special job placement assistance by the Republic of Panama for employment in positions for which they may be qualified by experience and training.

8. The Parties agree to establish a system whereby the Panama Canal Commission may, if deemed mutually convenient or desirable by the two Parties, assign certain employees of the Panama Canal Commission, for a limited period of time, to assist in the operation of activities transferred to the responsibility of the Republic of Panama as a result of this Treaty or related agreements. The salaries and other costs of employment of any such persons assigned to provide such assistance shall be reimbursed to the United States of America by the Republic of Panama.

9. (a) The right of employees to negotiate collective contracts with the Panama Canal Commission is recognized. Labor relations with employees of the Panama Canal Commission shall be conducted in accordance with forms of collective bargaining established by the United States of America after consultation with employee unions.

(b) Employee unions shall have the right to affiliate with international labor organizations.

10. The United States of America will provide an appropriate early optional retirement program for all persons employed by the Panama Canal Company or Canal Zone Government immediately prior to the entry into force of this Treaty. In this regard, taking into account the unique circumstances created by the provisions of this Treaty, including its duration, and their effect upon such employees, the United States of America shall, with respect to them:

(a) determine that conditions exist which invoke applicable United States law permitting early retirement annuities and apply such law for a substantial period of the duration of the Treaty;

(b) seek special legislation to provide more liberal entitlement to, and calculation of, retirement annuities than is currently provided for by law.



## ARTICLE XI

## PROVISIONS FOR THE TRANSITION PERIOD

1. The Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms. In order to provide for an orderly transition to the full application of the jurisdictional arrangements established by this Treaty and related agreements, the provisions of this Article shall become applicable upon the date this Treaty enters into force, and shall remain in effect for thirty calendar months. The authority granted in this Article to the United States of America for this transition period shall supplement, and is not intended to limit, the full application and effect of the rights and authority granted to the United States of America elsewhere in this Treaty and in related agreements.

2. During this transition period, the criminal and civil laws of the United States of America shall apply concurrently with those of the Republic of Panama in certain of the areas and installations made available for the use of the United States of America pursuant to this Treaty, in accordance with the following provisions:

(a) The Republic of Panama permits the authorities of the United States of America to have the primary right to exercise criminal jurisdiction over United States citizen employees of the Panama Canal Commission and their dependents, and members of the United States Forces and civilian component and their dependents, in the following cases:

(i) for any offense committed during the transition period within such areas and installations, and

(ii) for any offense committed prior to that period in the former Canal Zone.

The Republic of Panama shall have the primary right to exercise jurisdiction over all other offenses committed by such persons, except as otherwise provided in this Treaty and related agreements or as may be otherwise agreed.

(b) Either Party may waive its primary right to exercise jurisdiction in a specific case or category of cases.

3. The United States of America shall retain the right to exercise jurisdiction in criminal cases relating to offenses committed prior to the entry into force of this Treaty in violation of the laws applicable in the former Canal Zone.

4. For the transition period, the United States of America shall retain police authority and maintain a police force in the aforementioned areas and installations. In such areas, the police authorities of the United States of America may take into custody any person not subject to their primary jurisdiction if such person is believed to have committed or to be committing an offense against applicable laws or regulations, and shall promptly transfer custody to the police authorities of the Republic of Panama. The United States of America and the Republic of Panama shall establish joint police patrols in agreed areas. Any arrests conducted by a joint patrol shall be the responsibility of the patrol member or members representing the Party having primary jurisdiction over the person or persons arrested.

5. The courts of the United States of America and related personnel, functioning in the former Canal Zone immediately prior to the entry into force of this Treaty, may continue to function during the transition period for the judicial enforcement of the jurisdiction to be exercised by the United States of America in accordance with this Article.

6. In civil cases, the civilian courts of the United States of America in the Republic of Panama shall have no jurisdiction over new cases of a private civil nature, but shall retain full jurisdiction during the transition period to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty.

7. The laws, regulations, and administrative authority of the United States of America applicable in the former Canal Zone immediately prior to the entry into force of this Treaty shall, to the extent not inconsistent with this Treaty and related agreements, continue in force for the purpose of the exercise by the United States of America of law enforcement and judicial jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two Parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

8. During this transition period, the United States of America may continue to incarcerate individuals in the areas and installations made available for the use of the United States of America by the Republic of Panama pursuant to this Treaty and related agreements, or to transfer them to penal facilities in the United States of America to serve their sentences.

## ARTICLE XII

### A SEA-LEVEL CANAL OR A THIRD LANE OF LOCKS

1. The United States of America and the Republic of Panama recognize that a sea-level canal may be important

for international navigation in the future. Consequently, during the duration of this Treaty, both Parties commit themselves to study jointly the feasibility of a sea-level canal in the Republic of Panama, and in the event they determine that such a waterway is necessary, they shall negotiate terms, agreeable to both Parties, for its construction.

2. The United States of America and the Republic of Panama agree on the following:

(a) No new interoceanic canal shall be constructed in the territory of the Republic of Panama during the duration of this Treaty, except in accordance with the provisions of this Treaty, or as the two Parties may otherwise agree; and

(b) During the duration of this Treaty, the United States of America shall not negotiate with third States for the right to construct an interoceanic canal on any other route in the Western Hemisphere, except as the two Parties may otherwise agree.

3. The Republic of Panama grants to the United States of America the right to add a third lane of locks to the existing Panama Canal. This right may be exercised at any time during the duration of this Treaty, provided that the United States of America has delivered to the Republic of Panama copies of the plans for such construction.

4. In the event the United States of America exercises the right granted in paragraph 3 above, it may use for that purpose, in addition to the areas otherwise made available to the United States of America pursuant to this Treaty, such other areas as the two Parties may agree upon. The terms and conditions applicable to Canal operating areas made available by the Republic of Panama for the use of the United States of America pursuant to Article III of this Treaty shall apply in a similar manner to such additional areas.



5. In the construction of the aforesaid works, the United States of America shall not use nuclear excavation techniques without the previous consent of the Republic of Panama.

### ARTICLE XIII

#### PROPERTY TRANSFER AND ECONOMIC PARTICIPATION BY THE REPUBLIC OF PANAMA

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and free of liens and debts, except as the two Parties may otherwise agree.

2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include buildings and other facilities, except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion, thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama

in accordance with paragraph 5(b) of Annex B, to the Agreement in Implementation of Article IV of this Treaty at such time as such units are made available to the Republic of Panama.

(d) Upon termination of this Treaty, all real property and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal, in accordance with the following:

(a) An annual amount to be paid out of Canal operating revenues computed at a rate of thirty hundredths of a United States dollar (\$0.30) per Panama Canal net ton, or its equivalency, for each vessel transiting the Canal after the entry into force of this Treaty, for which tolls are charged. The rate of thirty hundredths of a United States dollar (\$0.30) per Panama Canal net ton, or its equivalency, will be adjusted to reflect changes in the United States wholesale price index for total manufactured goods during biennial periods. The first adjustment shall take place five years after entry into force of this Treaty, taking into account the changes that occurred in such price index during the preceding two years. Thereafter, successive adjustments shall take place at the end of each biennial period. If the United States

of America should decide that another indexing method is preferable, such method shall be proposed to the Republic of Panama and applied if mutually agreed.

(b) A fixed annuity of ten million United States dollars (\$10,000,000) to be paid out of Canal operating revenues. This amount shall constitute a fixed expense of the Panama Canal Commission.

(c) An annual amount of up to ten million United States dollars (\$10,000,000) per year, to be paid out of Canal operating revenues to the extent that such revenues exceed expenditures of the Panama Canal Commission including amounts paid pursuant to this Treaty. In the event Canal operating revenues in any year do not produce a surplus sufficient to cover this payment, the unpaid balance shall be paid from operating surpluses in future years in a manner to be mutually agreed.

## ARTICLE XIV

### SETTLEMENT OF DISPUTES

In the event that any question should arise between the Parties concerning the interpretation of this Treaty or related agreements, they shall make every effort to resolve the matter through consultation in the appropriate committees established pursuant to this Treaty and related agreements, or, if appropriate, through diplomatic channels. In the event the Parties are unable to resolve a particular matter through such means, they may, in appropriate cases, agree to submit the matter to conciliation, mediation, arbitration, or such other procedure for the peaceful settlement of the dispute as they may mutually deem appropriate.

DONE at Washington, this 7th day of September, 1977, in duplicate, in the English and Spanish languages, both texts being equally authentic.

## ANNEX

PROCEDURES FOR THE CESSATION OR TRANSFER  
OF ACTIVITIES CARRIED OUT BY THE  
PANAMA CANAL COMPANY AND THE  
CANAL ZONE GOVERNMENT AND  
ILLUSTRATIVE LIST OF THE  
FUNCTIONS THAT MAY BE PERFORMED  
BY THE PANAMA CANAL COMMISSION

1. The laws of the Republic of Panama shall regulate the exercise of private economic activities within the areas made available by the Republic of Panama for the use of the United States of America pursuant to this Treaty. Natural or juridical persons who, at least six months prior to the date of signature of this Treaty, were legally established and engaged in the exercise of economic activities in the former Canal Zone, may continue such activities in accordance with the provisions of paragraphs 2-7 of Article IX of this Treaty.

2. The Panama Canal Commission shall not perform governmental or commercial functions as stipulated in paragraph 4 of this Annex, provided, however, that this shall not be deemed to limit in any way the right of the United States of America to perform those functions that may be necessary for the efficient management, operation and maintenance of the Canal.

3. It is understood that the Panama Canal Commission, in the exercise of the rights of the United States of America with respect to the management, operation and maintenance of the Canal, may perform functions such as are set forth below by way of illustration:

a. Management of the Canal enterprise.

b. Aids to navigation in Canal waters and in proximity thereto.



- c. Control of vessel movement.
- d. Operation and maintenance of the locks.
- e. Tug service for the transit of vessels and dredging for the piers and docks of the Panama Canal Commission.
- f. Control of the water levels in Gatun, Alajuela (Madden) and Miraflores Lakes.
- g. Non-commercial transportation services in Canal waters.
- h. Meteorological and hydrographic services.
- i. Admeasurement.
- j. Non-commercial motor transport and maintenance.
- k. Industrial security through the use of watchmen.
- l. Procurement and warehousing.
- m. Telecommunications.
- n. Protection of the environment by preventing and controlling the spillage of oil and substances harmful to human or animal life and of the ecological equilibrium in areas used in operation of the Canal and the anchorages.
- o. Non-commercial vessel repair.
- p. Air conditioning services in Canal installations.
- q. Industrial sanitation and health services.
- r. Engineering design, construction and maintenance of Panama Canal Commission installations.
- s. Dredging of the Canal channel, terminal posts and adjacent waters.

t. Control of the banks and stabilizing of the slopes of the Canal.

u. Non-commercial handling of cargo on the piers and docks of the Panama Canal Commission.

v. Maintenance of public areas of the Panama Canal Commission, such as parks and gardens.

w. Generation of electric power.

x. Purification and supply of water.

y. Marine salvage in Canal waters.

z. Such other functions as may be necessary or appropriate to carry out, in conformity with this Treaty and related agreements, the rights and responsibilities of the United States of America with respect to the management, operation and maintenance of the Panama Canal.

4. The following activities and operations carried out by the Panama Canal Company and the Canal Zone Government shall not be carried out by the Panama Canal Commission, effective upon the dates indicated herein:

(a) Upon the date of entry into force of this Treaty:

(i) Wholesale and retail sales, including those through commissaries, food stores, department stores, optical shops and pastry shops;

(ii) The production of food and drink, including milk products and bakery products;

(iii) The operation of public restaurants and cafeterias and the sale of articles through vending machines;

(iv) The operation of movie theatres, bowling alleys, pool rooms and other recreational and amusement facilities for the use of which a charge is payable;

(v) The operation of laundry and dry cleaning plants other than those operated for official use;

(vi) The repair and service of privately owned automobiles or the sale of petroleum or lubricants there-to, including the operation of gasoline stations, repair garages and tire repair and recapping facilities, and the repair and service of other privately owned property, including appliances, electronic devices, boats, motors, and furniture;

(vii) The operation of cold storage and freezer plants other than those operated for official use;

(viii) The operation of freight houses other than those operated for official use;

(ix) The operation of commercial services to and supply of privately owned and operated vessels, including the construction of vessels, the sale of petroleum and lubricants and the provision of water, tug services not related to the Canal or other United States Government operations, and repair of such vessels, except in situations where repairs may be necessary to remove disabled vessels from the Canal;

(x) Printing services other than for official use;

(xi) Maritime transportation for the use of the general public;

(xii) Health and medical services provided to individuals, including hospitals, leprosariums, veterinary, mortuary and cemetery services;

(xiii) Educational services not for professional training, including schools and libraries;

(xiv) Postal services;

(xv) Immigration, customs and quarantine controls, except those measures necessary to ensure the sanitation of the Canal;

(xvi) Commercial pier and dock services, such as the handling of cargo and passengers; and

(xvii) Any other commercial activity of a similar nature, not related to the management, operation or maintenance of the Canal.

(b) Within thirty calendar months from the date of entry into force of this Treaty, governmental services such as:

(i) Police;

(ii) Courts; and

(iii) Prison system.

5. (a) With respect to those activities or functions described in paragraph 4 above, or otherwise agreed upon by the two Parties, which are to be assumed by the Government of the Republic of Panama or by private persons subject to its authority, the two Parties shall consult prior to the discontinuance of such activities or functions by the Panama Canal Commission to develop appropriate arrangements for the orderly transfer and continued efficient operation or conduct thereof.

(b) In the event that appropriate arrangements cannot be arrived at to ensure the continued performance of a particular activity or function described in paragraph 4 above which is necessary to the efficient management, operation or maintenance of the Canal, the Panama Canal Commission may, to the extent consistent with the other provisions of this Treaty and related agreements, continue to perform such activity or function until such arrangements can be made.

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TREATY CONCERNING THE  
PERMANENT NEUTRALITY AND  
OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama have agreed upon the following:

ARTICLE I

The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama.

ARTICLE II

The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equity, so that there will be no discrimination against any nation, or its citizens or subjects concerning the conditions or charges of transit, or for any other reasons, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world. The foregoing shall be subject to the following requirements:

(a) Payment of tolls and other charges for transit and ancillary services, provided they have been fixed in conformity with the provisions of Article III(c);

(b) Compliance with applicable rules and regulations, provided such rules and regulations are applied in conformity with the provisions of Article III;

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(c) The requirement that transiting vessels commit no acts of hostility while in the Canal; and

(d) Such other conditions and restrictions as are established by this Treaty.

## ARTICLE III

1. For purposes of the security, efficiency and proper maintenance of the Canal the following rules shall apply:

(a) The Canal shall be operated efficiently in accordance with conditions of transit through the Canal, and rules and regulations that shall be just, equitable and reasonable, and limited to those necessary for safe navigation and efficient, sanitary operation of the Canal;

(b) Ancillary services necessary for transit through the Canal shall be provided;

(c) Tolls and other charges for transit and ancillary services shall be just, reasonable, equitable and consistent with the principles of international law;

(d) As a pre-condition of transit, vessels may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification, consistent with international practice and standards, for damages resulting from acts or omissions of such vessels when passing through the Canal. In the case of vessels owned or operated by a State or for which it has acknowledged responsibility, a certification by that State that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal shall be deemed sufficient to establish such financial responsibility;

(e) Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal,

irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as a condition of transit, to inspection, search or surveillance. However, such vessel may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations. In addition, such vessels shall be entitled to refuse to disclose their internal operation, origin, armament, cargo or destination. However, auxiliary vessels may be required to present written assurances, certified by an official at a high level of the government of the State requesting the exemption, that they are owned or operated by that government and in this case are being used only on government non-commercial service.

2. For the purposes of this Treaty, the terms "Canal," "vessel of war," "auxiliary vessel," "internal operation," "armament" and "inspection" shall have the meanings assigned them in Annex A to this Treaty.

#### ARTICLE IV

The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties.

#### ARTICLE V

After the termination of the Panama Canal Treaty, only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

## ARTICLE VI

1. In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Treaty, be entitled to transit the Canal irrespective of their internal operation, means of propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels will be entitled to transit the Canal expeditiously.

2. The United States of America, so long as it has responsibility for the operation of the Canal, may continue to provide the Republic of Colombia toll-free transit through the Canal for its troops, vessels and materials of war. Thereafter, the Republic of Panama may provide the Republic of Colombia and the Republic of Costa Rica with the right of toll-free transit.

## ARTICLE VII

1. The United States of America and the Republic of Panama shall jointly sponsor a resolution in the Organization of American States opening to accession by all nations of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this Treaty, agreeing to respect the regime of neutrality set forth herein.

2. The Organization of American States shall act as the depositary for this Treaty and related instruments.

## ARTICLE VIII

This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties.



The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Panama Canal Treaty, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments of ratification.

DONE at Washington, this 7th day of September, 1977, in the English and Spanish languages, both texts being equally authentic.

#### ANNEX A

1. "Canal" includes the existing Panama Canal, the entrances thereto and the territorial seas of the Republic of Panama adjacent thereto, as defined on the map annexed hereto (Annex B),<sup>1</sup> and any other interoceanic waterway in which the United States of America is a participant or in which the United States of America has participated in connection with the construction or financing, that may be operated wholly or partially within the territory of the Republic of Panama, the entrances thereto and the territorial seas adjacent thereto.

2. "Vessel of war" means a ship belonging to the naval forces of a State, and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew which is under regular naval discipline.

3. "Auxiliary vessel" means any ship, not a vessel of war, that is owned or operated by a State and used, for the time being, exclusively on government non-commercial service.

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<sup>1</sup> Not printed here.

4. "Internal operation" encompasses all machinery and propulsion systems, as well as the management and control of the vessel, including its crew. It does not include the measures necessary to transit vessels under the control of pilots while such vessels are in the Canal.

5. "Armament" means arms, ammunitions, implements of war and other equipment of a vessel which possesses characteristics appropriate for use for warlike purposes.

6. "Inspection" includes on-board examination of vessel structure, cargo, armament and internal operation. It does not include those measures strictly necessary for admeasurement, nor those measures strictly necessary to assure safe, sanitary transit and navigation, including examination of deck and visual navigation equipment, nor in the case of live cargoes, such as cattle or other livestock, that may carry communicable diseases, those measures necessary to assure that health and sanitation requirements are satisfied.

TEXTS OF SENATE CHANGES IN PACT

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*WASHINGTON, March 16—Following are the texts of the two major amendments and two major reservations to the Neutrality Treaty between the United States and Panama, which were incorporated in the resolution of ratification approved today by the Senate.*

*Adopted 84 to 5 March 10, 1978.*

## LEADERSHIP AMENDMENT 20

At the end of Article IV, insert the following:

“A correct and authoritative statement of certain rights and duties of the parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on Oct. 14, 1977, and by the Government of the Republic of Panama on Oct. 18, 1977, which is herein incorporated as an integral part of this treaty, as follows:

“‘Under the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional process, defend the canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the canal or against the peaceful transit of vessels through the canal.

“‘This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal

affairs of Panama. Any United States action will be directed at insuring that the canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.' ”

*Introduced by Senator Robert C. Byrd on behalf of Senator Howard H. Baker Jr. and 76 other senators, adopted 85 to 3 March 13.*

### LEADERSHIP AMENDMENT 21

“At the end of the first paragraph of Article VI, insert the following:

“In accordance with the Statement of Understanding mentioned in Article IV above: ‘The Neutrality Treaty provides that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit the canal expeditiously. This is intended, and it shall so be interpreted, to assure the transit of such vessels through the canal as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the canal RAPIDLY.’ ”

*Proposed by Senator Dennis DeConcini, Democrat of Arizona with Senator Wendell H. Ford, Democrat of Kentucky, as co-sponsor, adopted 75 to 23 today.*

### RESERVATION

Before the period at the end of the resolution of ratification, insert the following: “Subject to the condition, to be included in the instrument of ratification of the treaty to be exchanged with the Republic of Panama, that, notwithstanding the provisions of Article V or any other provision of the treaty, if the canal is closed, or its opera-



tions are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the canal or restore the operations of the canal as the case may be."

*Introduced by Senator Sam Nunn, Democrat of Georgia, with 13 co-authors or co-sponsors, adopted 82 to 16 March 15.*

### RESERVATION

"Subject to the condition that the instruments of ratification of the treaty shall be exchanged only upon the conclusion of the protocol of exchange, to be signed by authorized representatives of both Governments, which shall constitute an integral part of the treaty documents and which shall include the following: that nothing in this treaty shall preclude Panama and the United States from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate performance at any time after Dec. 31, 1999, of their responsibilities to maintain the regime of neutrality established in the treaty, including agreements or arrangements for the stationing of any United States forces or maintenance of defense sites after that date in the Republic of Panama that Panama and the United States may deem necessary or appropriate."

United States Court of Appeals for the Second Circuit

Docket No. 77-6107

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

BERTRAM L. PODELL, DEFENDANT-APPELLANT

September Term, 1977

No. 556

Argued January 26, 1978

Decided February 6, 1978

Before KAUFMAN, *Chief Judge*, LUMBARD and MULLIGAN, *Circuit Judges*.

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Appeal from a grant of summary judgment in favor of the United States in the amount of \$40,000 by Duffy, *J.* in the government's action to impress a constructive trust on monies received by appellant in breach of his fiduciary duty as a United States Congressman.

Affirmed.

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*Daniel M. Shientag*, New York, N.Y., for Defendant-Appellant.

*Richard J. McCarthy*, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York; Louis G. Corsi, Assist-

ant United States Attorney, of counsel), for Plaintiff-Appellee.

KAUFMAN, Chief Judge:

Bertram L. Podell appeals a grant of summary judgment in favor of the United States in the government's action to impose a constructive trust on monies Podell received in breach of his fiduciary duty as a United States Congressman. We reject Podell's argument, for the reasons we shall set forth, that his reluctance in acknowledging the clear implications of his guilty plea to charges that he violated, and conspired to violate, the federal conflict of interest statute<sup>1</sup> creates any material issues of fact. Moreover, we find meritless his contention that the government cannot recover the sums he received from third parties as a result of his illegal activities. Accordingly, we affirm.

## I.

In a ten-count indictment filed on July 12, 1973, former United States Congressman Bertram L. Podell was charged with conspiracy, the solicitation and acceptances of bribes, criminal conflict of interest, and perjury. At his criminal trial in September and October 1974, the government introduced evidence that, while a member of Congress, Podell received \$41,350 in legal fees and campaign contributions from representatives of

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<sup>1</sup> See 18 U.S.C. § 203 (1970), which provides in part:

(a) Whoever \* \* \* directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

(1) at a time when he is a Member of Congress \* \* \* in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission \* \* \*

(b) Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Leasing Consultants, Inc., in return for advocating the interests of one of the company's subsidiaries, Florida Atlantic Airlines. Podell had appeared before the Civil Aeronautics Board (CAB), the Federal Aviation Administration (FAA), the State Department, and the government of the Bahamas on behalf of the airline, which sought permission to operate a route between Florida and the Bahamas and opposed the FAA's proposed revocation of its operating certificate. See *United States v. Podell*, 519 F.2d 144 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975).

On October 1, 1974, the tenth day of trial, Podell pleaded guilty to selected portions of the indictment after he and his attorney were permitted carefully to edit the language of the charges.<sup>2</sup> In Count One, Paragraph One, Podell admitted he had conspired to violate 18 U.S.C. § 203, the federal conflict of interest statute. Count One, Paragraphs 5(b) and (c) set forth the means by which Podell acknowledged he had carried out this unlawful purpose, stating specifically that he had met with Bahamian officials, as well as the CAB and the FAA, on behalf of Florida Atlantic Airlines, and that he had been compensated for his work indirectly in the form of payments to the Citizen's Committee for the Reelection of Betram L. Podell and fees paid to his law firm, Podell & Podell. Podell also pleaded guilty to Count Five, a substantive violation of the conflict of interest statute. Subsequently, he was sentenced to two-years imprisonment on the conspiracy count, all but six months suspended, and fined \$5,000 on the conflict of interest count.<sup>3</sup> His guilty plea also rendered him "incapable of holding any office of honor, trust, or profit under the United States."<sup>4</sup>

The United States commenced the present action to impress a constructive trust and for an accounting on January 30, 1976. The complaint alleged that Podell, while a Congressman, received \$41,350 as compensation for his conflict of interest activities involving appear-

<sup>2</sup> See Appendix at end of case.

<sup>3</sup> We found the plea voluntary in *United States v. Podell*, 519 F.2d 144 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975).

<sup>4</sup> See 18 U.S.C. § 203(b), *supra*, note 1.



ances before the CAB and the FAA in connection with matters involving Florida Atlantic Airlines.<sup>5</sup> After answer, the government moved for summary judgment, relying upon Podell's guilty plea, portions of the transcript of the criminal trial, several affidavits and the three checks introduced in evidence in the criminal case—two checks, in the amount of \$10,000 and \$2,350, payable to Podell & Podell, and a \$29,000 check payable to Podell's campaign committee. Podell responded with an affidavit admitting that all but \$1,350 of the checks paid to the Podell firm were for his services, but not a word was uttered by him to explain the \$29,000 contribution. On May 31, 1977, Judge Duffy granted summary judgment in favor of the United States in the amount of \$40,000,<sup>6</sup> for the reasons stated in his opinion in *United States v. Podell*, 436 F. Supp. 1039 (S.D.N.Y. 1977).

## II.

On appeal, Podell argues that the government has not stated a claim, and that, even if it has, his guilty plea does not constitute an admission that he obtained the amounts alleged in the complaint.<sup>7</sup>

Podell asserts that since 18 U.S.C. § 218<sup>8</sup> authorizes the United States to bring suit to recover any sum paid

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<sup>5</sup> The complaint's first claim charged that Podell's conflict of interest activities on behalf of Florida Atlantic Airlines violated his fiduciary duty as a United States Congressman, and asked that he be made to account to the United States for all money he received for these improper actions. The second claim asserted that Podell's conduct which breached his agency relationship and his implied contract of employment, unjustly enriched him through monies which rightfully belong to the United States.

<sup>6</sup> Judgment was entered in the amount of \$40,000.00 on August 16, 1977. At that time, the United States waived any further rights it may have had against Podell for an accounting in excess of \$40,000.00.

<sup>7</sup> We also reject Podell's argument that the action is prohibited by the New York six-year statute of limitations for fraud. The United States is not subject to any statute of limitations in enforcing its rights, unless Congress specifically provides otherwise. See *United States v. Summerlin*, 310 U.S. 414 (1940). Podell has not cited any federal statute of limitations that would bar this action.

<sup>8</sup> 18 U.S.C. § 218 (1970) provides:

by the government in relation to a violation of the conflict of interest statute, Congress intended to preclude actions to impress a constructive trust on money received by the wrongdoer from third persons. But 18 U.S.C. § 218 specifically states that its remedy is "[i]n addition to any other remedies provided by law."<sup>9</sup> And it has been repeatedly held, both before and after the enactment of 18 U.S.C. § 218, that public officials and employees serving interests in conflict with those of the United States for their own gain hold the funds they receive, no matter what the source, in constructive trust for the government. See *United States v. Carter*, 217 U.S. 286 (1910); *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964); *United States v. Drisko*, 303 F. Supp. 858 (E.D. Va. 1969). The Supreme Court stated the principle succinctly in *Carter*: "The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent [of the United States.]" 217 U.S. at 306.

Podell attempts to distinguish the authorities cited above, arguing that he did not breach his fiduciary duty to the United States because his violation of the statute was merely "technical". We reject this suggestion; the offense was so serious that it forever bars him from holding any position of public trust "under the United

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Footnotes continued from last page

In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or transfer or delivery of anything to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.

<sup>9</sup> *Id.*

States." Accordingly, Podell's attack on the sufficiency of the government's cause of action must fail.

### III.

We turn to Podell's argument that summary judgment was improper because his guilty plea does not preclude him from disputing the amounts he received during his illicit activities.

It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case. See *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *United States v. Frank*, 494 F.2d 145, 160 (2d Cir.), cert. denied sub nom. *Borgman v. United States*, 419 U.S. 828 (1974). Cf. *Emich Motors v. General Motors*, 340 U.S. 558, 568-69 (1951). Accordingly, Podell's guilty plea to Count Five of the indictment, a substantive violation of the conflict of interest statute, forecloses him from denying his breach of fiduciary duty to the United States.

Count Five, however, does not state with specificity the compensation Podell received. And, although the particular facts relating to the payments are set forth in Paragraph 5(c) of Count One, Podell argues that his plea of guilt under that paragraph admitted only a general conspiracy and does not determine which of the specific payments described in the indictment were, in fact, made pursuant to the conspiracy.

The collateral estoppel effect of a finding of guilt on a general conspiracy count is limited to the essence of the conspiracy when it cannot be determined which means were used to carry out the unlawful purpose of the conspiracy. See *United States v. Guzzone*, 273 F.2d 121 (2d Cir. 1959). See also *Emich Motors v. General Motors*, supra, 340 U.S. at 569. In this case, however, we are not confronted with an undifferentiated conspiracy count. Indeed, the guilty plea was clearly delineated. Podell carefully struck the portions of the indictment to which he did not desire to plead guilty, even deleting language in the crucial paragraph in this case—paragraph 5(c) of Count One.<sup>10</sup> We conclude that by exhibiting such pains-

<sup>10</sup> See note 2, supra.



taking care to remove particular language from Paragraph 5(c), Podell in effect and, indeed, in actuality, admitted the truth of the remainder of the paragraph's allegations.<sup>11</sup>

Since the three checks submitted in this case were the same as those admitted in evidence during the criminal trial, the district court correctly concluded that they were the payments referred to in the indictment. Unlike most guilty plea cases, appellant's guilty plea was not entered in an evidentiary vacuum, but rather after the government had presented its entire case and Podell had begun to present his own. The teaching of the Supreme Court in *Emich Motors v. General Motors, supra*, 340 U.S. at 569, is that in a situation involving the estoppel effect of a criminal judgment resting on a general conspiracy count, the court in a subsequent civil case should determine precisely what was decided in the criminal case by examining the record of the criminal trial, including the pleadings, the evidence submitted, and any opinions of the court. In this case, the elements of the charges in the indictment were amply supported in the trial record. *See United States v. Podell*, 519 F.2d 144 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975). Indeed, Podell's affidavit does not dispute receiving the \$29,000 check nor \$11,000 of the remaining checks. Accordingly, the grant of summary judgment was proper, and we affirm.

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<sup>11</sup> This conclusion is bolstered by Podell's statement in open court during the guilty plea allocution that he was pleading guilty to the selected portions of the indictment:

The Court: [to Mr. Podell] Mr. LaRossa, your counsel, has indicated that you are pleading guilty to certain counts of the indictment with certain deletions. I want to know whether that is, in fact, true, whether you are in fact doing that.

Defendant Podell: Yes, I am.



## Appendix

The portions of the indictment to which Podell pleaded guilty follow. (Portions of the relevant paragraphs deleted by careful editing by appellant's counsel with the appellant's consent are bracketed. In addition, Podell and his counsel eliminated Paragraphs 2 through 4 and 5(a), and the Overt Acts in Count One from the indictment. Counts Two through Four and Six through Ten of the indictment were also expunged upon counsel's and appellant's request. These deletions, *inter alia*, removed all references to an alleged co-conspirator and to the Department of State, and eliminated all charges except the conflict of interest and related conspiracy charges):

### COUNT ONE

The Grand Jury charges:

1. From in or about March 1968, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, BERTRAM L. PODELL, [HERBERT S. PODELL,] and MARTIN MILLER, the defendants, and Kenneth G. Burnstine, and Michael Zorovich, named as co-conspirators but not as defendants, did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown, to violate Section[s 201 and] 203 of Title 18 United States Code and to defraud the United States and its departments, agencies and branches by obstructing, hindering and impairing said departments, agencies and branches in connection with the performance of their lawful governmental functions, including; the lawful governmental functions of the United States Congress and the legitimate representation by its Members of the interests of the United States and their constituents; the lawful governmental functions of the Civil Aeronautics Board (CAB), the Federal Aviation Administration (FAA) [and the Department of State] in considering and approving routes for international air travel; the lawful governmental functions of the FAA in its determinations as to revocations of operating certificates [; and the lawful governmental functions of the Department of State in its relationships with foreign governments,]

[Paragraphs 2-4 of Count One deleted.]

5. Among the means by which the defendants and their co-conspirators would and did carry out the unlawful purposes set forth above, were the following:

[Paragraph 5(a) of Count One deleted.]

(b) The defendant BERTRAM L. PODELL would and did, travel to the Bahama Islands to speak to the United States and Bahamian officials, and send letters and make telephone calls to, and attend meetings with, officers and employees of the

United States and of agencies and departments thereof, including the CAB, the FAA [and the Department of State,] for the purpose of affecting, inducing, and pressuring said officials, officers and employees on behalf of FAAL.

(c) The defendant MARTIN MILLER and co-conspirators Kenneth G. Burnstine and Michael Zorovich would and did offer, and would and did [directly and] indirectly pay and caused to be paid, money and other things of value to the defendants BERTRAM L. PODELL, [and HERBERT S. PODELL,] and others, in the form of payments to the Citizen's Committee for the Re-election of Bertram L. Podell and in the form of fees to the law firm of Podell & Podell, and the defendants BERTRAM L. PODELL [and HERBERT S. PODELL] would and did agree to receive and did receive money and other things of value in return for the services described in paragraph[s 5(a) and] 5(b) of this count.

[Recitation of Overt Acts in Count One, and Counts Two through Four deleted.]

#### COUNT FIVE

The Grand Jury further charges:

From in or about December, 1968 up to and including September 24, 1970, in the Southern District of New York, BERTRAM L. PODELL, a Member of Congress, [and HERBERT S. PODELL,] the defendants, unlawfully, wilfully and knowingly otherwise than as provided by law for the proper discharge of official duties, directly and indirectly did receive and agree to receive, ask, demand, solicit, and seek compensation for services rendered and to be rendered by the defendant BERTRAM L. PODELL and others in relation to proceedings, applications, requests for rulings and other determinations, controversies and other particular matters in which the United States was a party and had a direct and substantial interest, before departments, agencies and officers of the United States, namely, an application by FAAL for a route designation then pending before the CAB [and the Department of State], and a proceeding for suspension and revocation of FAAL's operating certificate then pending before the FAA and the National Air Transportation Safety Board.

(Title 18, United States Code, Sections 203(a) and 2).

[Counts Six through Ten deleted.]



United States District Court for the District of  
Columbia

Civil Action No. 78-188

SENATOR HOWARD M. METZENBAUM ET AL., PLAINTIFFS,

and

CESSNA AIRCRAFT COMPANY, PLAINTIFF-INTERVENOR

*v.*

HAROLD BROWN ET AL., DEFENDANTS

and

BEECH AIRCRAFT CORPORATION, DEFENDANT-INTERVENOR

MEMORANDUM

Senators Howard M. Metzenbaum and Barry M. Goldwater have filed this suit to enjoin Secretary of Defense Harold Brown and Secretary of the Navy Graham Claytor from purchasing 22 turboprop light utility transport airplanes (CTX aircraft) for the Navy without advertising for competitive bids. The Senators claim the purchase would violate their constitutional right to vote as Senators for the Department of Defense Appropriation Authorization Act, 1978 (1978 Appropriation) which authorized funds for the CTX aircraft purchase.<sup>1</sup>

The 1978 Appropriation provided that:

Funds are hereby authorized to be appropriated during the fiscal year 1978 for the use of the Armed Forces of the United States for the procurement of

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<sup>1</sup> Pub. L. No. 95-79, 91 Stat. 323 (1977).



aircraft \* \* \* as authorized by law, in amounts as follows:

\* \* \*

For aircraft: \* \* \* for the Navy and the Marine Corps, \$3,499,800,000. \* \* \*

At the time the 1978 Appropriation was under consideration (and since), the determination as to whether the Secretaries should procure Navy property by formal advertising or by other methods was governed by a statute codified in 1956. 10 U.S.C. § 2301 (1970), *et seq.*<sup>2</sup> Section 2304(a) of Title 10 provides that:

Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances.

In the course of enacting the 1978 Appropriation, the Armed Services Committee of the Senate (of which Senator Goldwater was a member) recommended authorization of \$21.6 million to enable the Navy to purchase the 22 CTX aircraft. The committee recommended procurement of an "off the shelf" aircraft (*i.e.*, already in production) which is "common with the Army/Air Force light utility transport."<sup>3</sup> A House/Senate Conference Committee thereafter filed a report designed to resolve differences between the two Houses about the 1978 Appropriation. That report stated that the House had deleted the Navy request for the 22 CTX aircraft because

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<sup>2</sup> Section 2304(a) lists 17 exceptions to the general requirement of formal advertising such as subsection (a)(13) which authorizes dispensing with such advertising for the procurement of technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest.

<sup>3</sup> S. Rep. No. 95-129, 95th Cong., 1st Sess. 28 (1977). The House Appropriations Committee similarly recommended that the Navy "buy the aircraft that is common to the Army and Air Force." H.R. Rep. No. 95-451, 95th Cong., 1st Sess. 241-42 (1977). A subsequent report by the Senate Appropriation Committee recommended the procurement of a "commercial, off-the-shelf FAA certified" product for CTX utility aircraft without reference to the procurement's being common with the Army and Air Force utility aircraft. S. Rep. No. 95-325, 95th Cong., 1st Sess. 211 (1977).

the Navy "had not even begun source selection and had not completed detailed specifications of the aircraft it intends to purchase." After discussion, the conferees agreed, however, "to provide funds for an off-the-shelf turboprop, light utility transport aircraft" in the amount of \$21.6 million originally authorized by the Senate bill.<sup>4</sup>

When the Conference Report was submitted to the full Senate for approval, four Senators, including the two plaintiffs here, engaged in a colloquy about the meaning of the Conference Committee Report with respect to Navy procurement of the CTX aircraft. In the colloquy, Senator Metzenbaum, who was not a member of the Conference Committee, asked Senator John Stennis, a member of that committee (and Chairman of the Senate Armed Services Committee), if the Conference Committee had intended to recommend that the CTX aircraft be procured by competitive bidding. Senator Stennis replied affirmatively. Senators Goldwater and Towers concurred with Senator Stennis.<sup>5</sup>

After the colloquy, the 1978 Appropriation was passed by Congress, signed by the President, and became effective on July 30, 1977. It contained no reference, specific or otherwise, to the method by which the CTX aircraft should be procured and made no change in the 1956 law.

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<sup>4</sup> S. Rep. No. 95-282, 95th Cong., 1st Sess. 21 (1977). Neither the Conference Committee Report nor any of the other Committee Reports referred to the question of whether the 22 CTX aircraft would be procured by formal advertising or by some other method. None of the reports referred to the 1956 law or suggested modification of special application of that law to the 1978 Appropriation.

<sup>5</sup> Senator Metzenbaum asked Senator Stennis: "[I]f it was the intent of the Conference Report that the CTX be competitively procured?" Senator Stennis replied, "Yes. The Senator is certainly correct." Senator Goldwater added "I think that we have made it perfectly clear on the floor that this is to be competitive bidding." Later in the colloquy, Senator Stennis stated: "There is no doubt that it is an open bid for any manufacturer who can meet these requirements." Senator Towers, another member of the Conference Committee, then joined the colloquy with the statement: "My understanding certainly is consistent with that of the distinguished chairman, that this is to be competitive. I was part of the deliberation on this. That was the intention." 123 Cong. Rec. S11875-76 (daily ed. July 14, 1977).

Thereafter, the Department of the Navy issued to the Department of the Army an interdepartmental purchase request for the procurement of the CTX aircraft from the Beech Aircraft Corporation (Beech), the common source already supplying the CTX aircraft to the Army and Air Force. This request, dated December 15, 1977, was issued without any advertisement for competitive bids from other actual or potential manufacturers of such aircraft.

Meanwhile, on September 30, 1977, Senators Metzenbaum and Goldwater wrote Secretary Claytor about the Senators' colloquy on the Senate floor and their concern that the procurement of the planes be consistent with it. Secretary Claytor replied on October 31, 1977, that the Department of Navy had thoroughly reviewed the legislative history of the 1978 Appropriation, including the Senators' colloquy and had found that it was in the "best interest of the Navy to acquire \* \* \* the aircraft that is common with the Air Force and Army." On December 6, 1977, Senator Metzenbaum wrote Secretary Brown regarding the colloquy and the Senator's concern for competitive procurement. Secretary Brown replied on January 12, 1978, that procurement of an aircraft common with the Army and Air Force is "a reasonable business approach."<sup>6</sup> Finally, both Senators wrote jointly to Secretary Brown reiterating their concern and noting the possibility that they might file a suit to enjoin the procurement from the common source, Beech Aircraft Corporation.

The Senators' complaint, filed February 2, 1978, alleges that the 1978 Appropriation was intended to determine that Navy procurement of the CTX aircraft by competitive bidding would be feasible and practicable within the meaning of the 1956 law, and that the Secretaries were illegally procuring the aircraft by a non-competitive method. The complaint asked the Court for a declaratory judgment to this effect together with temporary and permanent injunctive relief.

At a hearing on the Senators' application for a restraining order, counsel for defendants questioned the

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<sup>6</sup> Secretary Brown sent an identical reply to Senator Goldwater on December 29, 1977.



standing of the Senators to bring this suit and requested the Court either to dismiss their complaint immediately or to defer any injunctive relief until the standing question could be fully briefed and argued in the context of a motion to dismiss. On the assurance of counsel that the defendants would not change the *status quo* until such a motion could be considered, the Court deferred action on the applications for preliminary and temporary relief.

In the interim, Beech and Cessna Aircraft Corporation (Cessna), the latter a prospective bidder for the CTX aircraft procurement, both moved for leave to intervene. The Court granted the motions of both potential intervenors for the limited purpose of permitting them to address the jurisdiction of the Court in the action initiated by the Senators. Thereafter, Cessna brought a separate action to invalidate the Navy-Beech contract. *Cessna Aircraft Co. v. Brown*, No. 78-293 (D.D.C., filed Feb. 21, 1978). Pursuant to Local Rule 3-4 that case has been assigned to this Court.

The Motion to Dismiss challenging the Senators' standing to sue here has now been fully briefed and argued. The Court is persuaded that the Senators do not have standing to sue with respect to this Navy aircraft procurement. The Motion to Dismiss is well taken and it will be granted, and the Motions to Intervene will be denied as moot.<sup>7</sup>

In order to invoke the Court's power to enjoin action by the Executive Branch, any plaintiff must allege an "injury in fact" sufficient to create a case or controversy within the meaning of Article III of the Constitution. *E.g.*, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The Court's power to enjoin an Executive Branch procurement contract is particularly circumscribed. *E.g.*, *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

These principles apply to actions brought by Senators and Congressmen to enjoin Executive Branch action. Compare *Kennedy v. Sampson*, 167 U.S. App. D.C. 192, 511 F.2d 430 (D.C. Cir. 1974) with *Harrington v. Bush*,

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<sup>7</sup> In the separate action originated by Cessna, the Court will soon hold a status conference with a view to its expedited consideration.



U.S. 180 App. D.C. 45, 553 F.2d 190 (D.C. Cir. 1977). In *Kennedy*, our Court of Appeals recognized the standing of a Senator to obtain judicial protection from Executive Branch injury to his right to vote for a specific Act of Congress which was allegedly being nullified and rendered of no force and effect by the unlawful failure and refusal of the President of the United States, by a so-called "pocket veto," either to sign or to veto the Act. The *Kennedy* case concerned the division of the legislative power to make laws between Congress and the President effected by Article I, Clause 7 of the Constitution. The provision, in effect, gives a majority of Congress power to enact a bill so that it will become law without approval by the President should he fail to return it to the Congress within ten days of passage—provided Congress is in session during the ten day period.

In *Kennedy*, 64 Senators and a large majority of the House of Representatives voted for a medical aid bill on the eve of Congress' Christmas recess. The President neither signed the bill, nor vetoed it. He claimed thereafter that Congress had adjourned at Christmas so that in the absence of his signature the bill did not become law. Senator Kennedy filed suit contending that Congress had merely recessed at Christmas and had not adjourned so that the bill had, in fact, become law and that the President was attempting unlawfully to nullify it.

The Court of Appeals ruled that the complaint put in issue the division of legislative power between the Congress and the President effected by Article I, Clause 7. Congress' share of that power, the Court ruled, was in turn shared by the individual Senators who voted for a bill threatened with nullification by an allegedly illegal veto. The illegal nullification would, if condoned, increase the power of the President over the enactment of bills of Congress into law, would diminish the power of Congress to make laws, and, would, in turn, diminish the power of each Senator and Congressman who voted for the threatened bill. Accordingly, the Court of Appeals held that such a threat of injury to a Senator's

share of Congress' legislative power to make laws was actionable by him.

Although the Senators' complaint here does not identify the particular constitutional provision which creates the right to vote for which they claim protection, the Court assumes that they rely upon Congress' power granted by Article I "to provide and maintain a Navy" and "to make Laws \* \* \* necessary and proper for carrying into Execution" that power. This power of Congress is exercised by making laws and by legislative oversight of the administration of those laws. No interference with either of these legislative functions has been alleged. In the absence of any allegation that the Secretaries interfered with the Senators' exercise of their share of Congress' legislative power to enact and to oversee the administration of the 1978 Appropriation, the claim of standing has no support in the *Kennedy* precedent.

Thus the validity of the Senators' claim to standing comes down to a question of whether a Senator or Congressman who voted for a bill which became law has standing, as Senator or Congressman, to sue to require administration of the law in accordance with his interpretation of it. The answer to that question is governed by our Court of Appeals decision in *Harrington v. Bush*, mentioned above. There a Congressman sued to enjoin CIA use of funds made available to it by an allegedly illegal appropriation. He claimed to have standing to sue because of, among other things, his "interest in seeing that all laws for which he voted are administered in accordance with the statutory mandate." 180 U.S. App. D.C. at 58, 553 F.2d at 203. The Court of Appeals described this as a claim that those who make the laws are "inherently injured" by any illegality associated with them. 180 U.S. App. D.C. at 59, 553 F.2d at 204. It ruled that there was no impairment or injury in fact to the Congressman's interest in his votes already cast. 180 U.S. App. D.C. at 68, 553 F.2d at 213. The allegedly illegal use of funds did not affect the legal status of the appropriations for which the Congressman had previously voted. Even if he would have voted differently if he had known of the CIA's illegal use of the appropri-

ation for which he voted, his constitutional right to vote to "make" laws and his "official influence" in the making of them were not injured. And, as the Court of Appeals ruled, once a bill for which a Congressman has voted becomes law, his only potentially legal interest in it arises from his status as a citizen, and not from his status as a Congressman. A Congressman's complaint about the administration of appropriations for which he voted becomes, therefore, "a 'generalized grievance about the conduct of government' which lacks the specificity to support a claim of standing." 180 U.S. App. D.C. at 69, 553 F.2d at 214.

The Senators here claim that their case is different from *Harrington* because they voted for the 1978 Appropriation after personally acting to assure procurement by competitive bidding: they engaged in a floor colloquy with two other Senators about the meaning of the then pending Conference Committee Report. They claim that the exercise of their official influence gave them a "stake" in litigation designed to compel interpretation and administration of the 1978 Appropriation in the way they and the two other Senators stated on the Senate floor that it should be interpreted and administered. The Secretaries' refusal to interpret and administer the 1978 Appropriation as requiring competitive bidding threatens, they urge, actionable injury to the Senators' official influence.

Since this matter is being considered on the pleadings, as counsel for the Senators correctly contends, the Court must assume for now that the 1978 Appropriation states, on its face, that competitive bidding for the CTX aircraft is "feasible and practicable." Therefore, the Court concludes, the fact that the Senators spoke to this effect on the Senate floor instead of causing the sense of their colloquy to be embodied in the statutory language does not increase their standing beyond that of any other Senator or Congressman who voted for the 1978 Appropriation.

As the Court reads *Harrington*, once the 1978 Appropriation became law, any constitutionally protected interest of the Senators in it entitled to judicial protection ended. They retain, of course, all the legislative preroga-

tives of powerful Senators, not only to communicate directly with the President and the Secretaries, but also to exercise legislative oversight over the administration of the 1978 Appropriation by (among other means) committee investigation and hearing, or by seeking intervention by the General Accounting Office to prevent unlawful expenditure of funds appropriated for this Navy procurement. But under *Harrington*, they are, for purposes of their standing to sue in court, in the same status as any other public spirited citizen concerned that the Secretaries administer the validly enacted 1978 Appropriation according to law. With respect for the Senators (and for the principle of Separation of Powers), the Court has therefore concluded that the complaint does not allege facts showing actionable injury to their constitutional right to vote to make laws for the procurement of naval aircraft or to their official influence in that process. Accordingly, an Order will accompany this Memorandum dismissing the complaint and denying the contractors leave to intervene.

LOUIS F. OBERDORFER,  
*United States District Judge.*

Dated: MAY 14, 1978.

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United States District Court for the  
District of Columbia

Civil Action No. 78-188

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SENATOR HOWARD M. METZENBAUM ET AL., PLAINTIFFS

and

CESSNA AIRCRAFT COMPANY, PLAINTIFF-INTERVENOR

v.

HAROLD BROWN ET AL., DEFENDANTS



and

BEECH AIRCRAFT CORPORATION, DEFENDANT-INTERVENOR

## ORDER

For reasons stated in a Memorandum to be filed, it is this 14th day of March 1978, hereby

ORDERED, ADJUDGED and DECREED: That the Motion to Dismiss is GRANTED, and it is

FURTHER ORDERED: That the Motions for Leave to Intervene are DENIED.

LOUIS F. OBERDORFER,  
*United States District Judge.*

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## APPENDIX

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MEMBERS OF THE 95TH CONGRESS PARTIES TO OR DIRECTLY  
CONCERNED WITH LITIGATION AFFECTING CONGRESS

ALPHABETICAL LISTING BY MEMBER'S NAME

SENATE

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